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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~365~~. 85

HENRY MICHAELS AND NATHAN LEVI, APPELLANTS,

vs.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF HARLOW E. MACARY AND HENRY S. MACARY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 11, 1872.

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1 United States circuit court, northern district of New York.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Harlow E. Macary and Henry Macary,
vs.
HENRY MICHAELS AND NATHAN LEVI.

The complainant herein filed his bill of complaint, which is hereto annexed, on the 18th day of May, 1870, against the defendants Henry Michaels and Nathan Levi; a subpœna to appear and answer in said cause was thereupon issued and was served personally previous to the return day thereof, on the defendants.

The defendants appeared in said cause, by O. M. Benedict, esq., as their solicitor.

On the 17th day of August, 1870, the defendants filed their answer to said bill of complaint, which answer is hereto annexed.

2. A replication to said answer was filed on the 22d day of August, 1870, which replication is hereto annexed.

Afterwards proofs were taken and filed by the respective parties herein, and at the June term of said circuit court held at the village of Canandaigua, on the 26th day of June, 1872, present, Hon. Lewis B. Woodruff, presiding judge, the said cause came on for a hearing upon said pleadings and proofs, and was argued by counsel for the respective parties, and submitted to the court for decision.

At the October term of said circuit court held at the city hall, in the city of Albany, on the second Wednesday of October, 1872, present, Hon. Lewis B. Woodruff, presiding judge, an order was made and entered herein, directing a decree, &c., for complainant, which said order is hereto annexed.

3 On the 26th day of October, 1872, complainant's solicitor filed a stipulation as to decree, which is hereto annexed.

A final decree was filed and entered herein, on the 26th day of October, 1872, which said final decree is hereto annexed.

In the circuit court of the United States for the northern district of New York, in equity.

To the judges of the circuit court of the United States for the northern district of New York, in equity:

Hoyt Post, of Detroit, Michigan, and a citizen of Michigan, assignee in bankruptcy of Harlow E. Macary and Henry S. Macary, bankrupts, brings this his bill against Henry Michaels and Nathan Levi, both of Rochester, New York, citizens of the State of New York, and therepon your orator humbly complaining, respectfully shows unto your honors that on

4 the *the* 19th day of November, A. D. 1869, a creditor's petition was duly filed in the district court of the United States, for the eastern district of Michigan, in bankruptcy, against the said Harlow E. and Henry S. Macary, then residents of Hudson, Michigan, which was within the said eastern district of Michigan, and who had resided there for more than six months preceeding the filing of said petition in bankruptcy; that said petition was filed for the purpose of having said Harlow E. and Henry S. Macary adjudged bankrupts under the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved, March 2d, A. D. 1867; that thereupon such proceedings were had in said cause; that subsequently, and on the

1st day of December, A. D. 1869, said Harlow E. and Henry S. Macary were duly adjudged bankrupts by said district court, and that thereupon such proceedings were therein had that on the eighth day of
5 January, A. D. 1870, your orator was, by said district court, duly appointed assignee, in bankruptcy, of the estate and effects of the said Harlow E. and Henry S. Macary; and your orator accepted said office, and has duly qualified as such assignee, and entered upon the performance of the duties of said trust; that on the 13th day of January, A. D. 1870, Hon. Hovey K. Clarke, register in bankruptcy, to whom said cause was referred, duly executed and delivered to your orator an assignment, in due form of law, of all the estate and property of said Harlow E. and Henry S. Macary, and to which said assignment your orator prays leave to refer for greater certainty, when the same shall be produced and proved, as the court may direct.

And your orator further shows upon information and belief, that on or about the 25th day of October, A. D. 1869, the said Harlow E. and Henry S. Macary were merchants doing business as partners un-
6 der the firm-name and style of "Macary Brothers," at the village of Hudson, Michigan, and for a long time prior thereto had been, and had a stock of merchandise in their store at said village.

And your orator further shows upon information and belief, that on and before said 25th day of October, A. D. 1869, the said Harlow E. and Henry S. Macary were insolvent and unable to pay their debts in full.

And your orator further shows upon information and belief, that on and before said 25th day of October, A. D. 1869, said Harlow E. and Henry S. Macary were indebted among other persons to said Henry Michaels and Nathan Levi, merchants residing and doing business in the city of Rochester, in the State of New York, within the northern district of New York, in the sum of between four and five thousand dollars, and that they were also largely indebted to other persons, all of which
7 indebtedness was long past due.

And your orator further shows upon information and belief, that the said Henry Michaels and Nathan Levi, becoming fearful of losing their said claim against said Harlow E. and Henry S. Macary, and being anxious to have the same paid or secured, the said Michaels went to said village of Hudson, on or about the 25th day of October, A. D. 1869, and took an inventory of the stock of goods of said Harlow E. and Henry S. Macary, and proposed to buy them out and leave the goods in the store at Hudson aforesaid, and permit the said Harlow E. and Henry S. Macary to continue their business, and to sell the said goods for said Henry Michaels and Nathan Levi at such prices as they could get for them, and account to said Michaels and Levi for the prices at which said Michaels marked said goods when taking said inventory, and to keep the balance for their commissions for selling the same;
8 that said Michaels on behalf of said Michaels and Levi agreed with said Harlow E. and Henry S. Macary in order to induce them to make this arrangement to furnish them additional goods to sell on the same terms aforesaid, as they should need them thereafter, to keep up their stock; that said Michaels suggested that in order to have the transaction look all right, it would be better to have the goods transferred to some third person, and proposed the name of one Sloman, of Coldwater, Michigan; that thereupon, in pursuance of this understanding and agreement, and at the instance and request of said Michaels, who managed the negotiation and made the bargain, the said Harlow E. and Henry S. Macary assigned and transferred their entire stock of

goods to said Sloman, who paid therefor in money and his promissory notes to the amount of about $4,000, which said notes and money
9 were all handed over to said Michaels, and said Michaels gave said Harlow E. and Henry S. Macary on behalf of said Michaels and Levi, a receipt in full of all demands against them; that as soon as this bargain was closed, or within a few days thereafter, the said Sloman, acting under the advice and instruction of said Michaels and Levi, made a demand of said Harlow E. and Henry S. Macary for the said goods, and upon their refusal to deliver them over to said Sloman, the latter brought a suit of replevin for said goods against said Harlow E. and Henry S. Macary in the circuit court for the county of Lenawee, in the State of Michigan, and in which writ he succeed' in recovering the said goods. That said goods together with a few outstanding accounts of little value constituted almost the entire property belonging to said Harlow E. and Henry S. Macary, or either of them, and that the taking away of said goods from them, as aforesaid, left them stripped of all means of
10 paying their other creditors.

Your orator further shows upon information and belief, that said Harlow E. and Henry S. Macary were at the time of the transfer of said goods to said Sloman, as aforesaid, and at the time of turning over said money and notes received of him therefor to said Michaels for said Michaels and Levi, as aforesaid, largely indebted to other creditors, several of whom have now proved their claims against the estate of said bankrupts.

And your orator further shows upon information and belief, that said pretended transfer of said goods to said Sloman was colorable merely, and was made at the instance and request of said Michaels, and in the interest and for the benefit of said Michaels and Levi, and was really and in fact a sale to said Michaels and Levi, and that the entire transaction as above set forth of said pretended sale and transfer of said goods, and of the payment of said money and notes to said Michaels and
11 Levi, was but a scheme on the part of said Michaels and Levi to obtain a preference, and your orator expressly charges that the same was made within four months before the filing of the petition against said bankrupts, with a view to give said Michaels and Levi a preference contrary to the provisions of the bankrupt act of 1867. And your orator submits and insists that if said sale should be held not to be a sale in fact to said Michaels and Levi, that the payment of said money and notes as aforesaid, to said Michaels and Levi, was a payment and transfer with a view to give said Michaels and Levi a preference, and hence was in fraud of the said bankrupt act.

And your orator further shows, upon information and belief, that said Harlow E. and Henry S. Macary have been largely indebted to said Michaels and Levi for a year and more prior to said transfer of said goods to said Sloman as aforesaid, and that said Michaels and
12 Levi knew all about the pecuniary condition of said Harlow E. and Henry S. Macary during all this time, and knew that their assets were not equal in value to their indebtedness, and that they were insolvent.

And your orator further shows, upon information and belief, that said sale & transfer of said goods to said Sloman, and the turning over of said notes and money to said Michaels and Levi as aforesaid, were not made in the ordinary course of the business of said Harlow E. and Henry S. Macary, and that the said Michaels & Levi had reasonable cause to believe that said Harlow E. and Henry S. Macary were insolvent at the time of said sale and transfer, and at the time of the turn-

ing over to said Michaels and Levi of the said notes and money as aforesaid, and that such sale and transfer of said goods to said Sloman, and the payment of said money and notes to said Michaels and Levi were in fraud of the provisions of said bankrupt act:

13 To the end, therefore, that the said Henry Michaels and Nathan Levi, defendants, may, if they can, show why your orator should not have the relief hereby prayed, and may, without oath, (their answers under oath being hereby expressly waived,) full, true, direct, and perfect answer make to all and singular the matters and things herein contained and set forth, and that as particularly as though the same were here again repeated, and they thereunto distinctly interrogated, and that they may be decreed to account to your orator for the value of the goods so transferred to said Sloman as aforesaid, whereof the proceeds were paid over to them as aforesaid, and that said sale may be declared to be a sale in effect to said Michaels and Levi, or that if sale of said goods to said Sloman shall be held not to have been in effect a sale to said Michaels and Levi, that the said Michaels and Levi may be decreed to account to your orator for the said money and the said

14 notes so paid and transferred to them as aforesaid, and that said defendants may be deemed to have lost any and all claim to any share or dividend in the property of said bankrupts, or in any property obtained by your orator, by virtue of the decree of the court herein, and that your orator may have such other or further relief, or both, in the premises, as to the court may seem meet and equitable,

May it please the court to grant to your orator the people's writ of subpœna in due form, to be directed to the said Henry Michaels and Nathan Levi, therein and thereby commanding them, and each of them, at a certain day and under a certain penalty, therein to be inserted, personally to be and appear in this honorable court, and then and there to answer this bill, and abide by the judgment and decree of the court in the premises.

And your orator will ever pray, &c.

HOYT POST,
Assignee as aforesaid.

F. A. MACOMBER,
Solicitor, and of Counsel for Complainant, Rochester, N. Y.

15 (Endorsed:) Circuit court of the United States for the northern district of New York, in equity. Hoyt Post, assignee in bankruptcy of Harlow E. Macary and Henry S. Macary, bankrupts, vs. Henry Michaels and Nathan Levi. Bill of complaint. F. A. Macomber, sol'r for compl'ts, Rochester, N. Y. Filed May 18, 1870.

16 *Def'ts answer.*

In the circuit court of the United States for the nothern district of New York.

HOYT POST, ASSIGNEE, &C.,
vs.
HENRY MICHAELS AND NATHAN LEVI.

Henry Michaels and Nathan Levi, defendants in this action, come into court, and, saving and reserving all right to except and object on the trial of this action to the form of action and the sufficiency of the

complaint and other questions proper there to be raised and made, I do hereby make answer to said complaint of plaintiff filed herein:

First. The said defendants deny each and every of the allegations and statements of the plaintiff, generally and specifically.

Second. For a second and separate answer, say and allege that said Sloman, in said bill of complaint mentioned, negotiated with and
17 purchase' of the said Harlow E. and Henry S. Macary, (composing the firm of Macary Bro's,) their stock of goods in good , and without any intention whatever of defrauding, or in any way or manner effecting, the creditors of said Macary Bro's, and without any knowledge or information that there were creditors of said Macary Bro's to be, or that could in any way be, affected by said purchase by him; that said purchase was made by said Sloman with the consent and approbation of A. T. Macary, the petitioning creditor in the said proceedings in bankruptcy, who, prior to said purchase, and to induce said Sloman to make the said purchase, executed a receipt in full of all demands against the said Harlow E. & Henry S. Macary, and at the time said purchase was made, fully assented to.

Third. These defendants allege that the said proceedings in bankruptcy alleged in said complaint were and are void and of no
18 effect; that they were collusive and a fraud upon the bankrupt act; that the petitioner in the case was not in fact a creditor of the said Harlow E. & Henry S. Macary, and that said proceedings were instituted and prosecuted at the request and in the interest of the said Macary Bro's, and with their consent, contrivance, and approbation, and by collusion with them.

Fourth. These defendants further, in answer and for separate defence, allege that the proceeds of the said sale to said Sloman were paid over to them, and received by them with the consent and approbation of the said A. T. Macary, the petitioning creditor in said bankrupt proceedings, who is the father of said Harlow E. and Henry S. Macary; that he was present, cognizant of, and consenting to all that was done in respect to the sale of said goods, and the disposition of the proceeds, and defendants deny that there were other creditors of said Macary
19 Bro's, who would or could institute the same proceedings against the said Macary Bro's.

O. M. BENEDICT,
Def't's Att'y.

(Endorsed:) U. S. circuit court N. D. of N. Y. Hoyt Post vs. Henry Michaels & Nathan Levi. Answer. O. M. Benedict, defendant's att'y. Filed August 17, 1870.

20 The circuit court of the United States for the northern district of New York, in equity.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Harlow E. Macary and Henry S. Macary, bankrupts,
vs.
HENRY MICHAELS & NATHAN LEVI.

Replication of Hoyt Post, complainant, to the answer of the defendants.

This repliant, saving and reserving to himself now and at all times hereafter all manner of benefit and advantage of exceptions which may

be had or taken to the manifold insufficiencies of the said answer, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant without
21 this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

F. A. MACOMBER,
Sol. for Complainant, Rochester, N. Y.

(Endorsed:) United States circuit court, northern district of New York, in equity. Hoyt Post, assignee, vs. Henry Michaels et al. Replication. F. A. Macomber, sol. for compl't, Rochester, N. Y. Filed August 22, 1870.

22 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city-hall, in the city of Albany, on Tuesday, the 8th day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Lewis P. Woodruff, judge.

HOYT POST, ASSIGNEE, &C.,
vs.
HENRY MICHAELS AND NATHAN LEVI.

This cause, having heretofore come on for a hearing upon pleadings and proofs, and having been argued by counsel for the respective parties, and the court having considered the same, ordered decree for complainants for the relief prayed for in the bill of complaint, and for the recovery of the proceeds of the sale of the stock of goods late of the bankrupts or in the bill mentioned, being $3,482.39, with
23 interest thereon, or, if the complainant so elect, for the recovery of the value of the goods, in which case a reference will be ordered to ascertain such value; and further, that the complainant recover his costs of suit, and that the defendants be debarred any share in the estate of the bankrupts in the hands of the complainant as assignee.

L. B. WOODRUFF.

(Endorsed:) U. S. circuit court, north. dis't of N. Y. Hoyt Post, assignee, &c., vs. Michaels & Levi. Order for decree, &c. Filed October 8, 1872.

24 U. S. circuit court, northern district of New York, in equity.

HOYT POST, ASSIGNEE, &C.,
vs.
HENRY MICHAELS ET AL.

The above-named complainant does not elect to take a decree in this suit for the recovery of the value of the goods mentioned in the bill of

complaint and the decretal order, but, on the contrary, elects to take judgment for the sum of $3,482.39, and interest, as in said order mentioned.

F. A. MACOMBER,
Sol. for Compl't.

Dated October 25, 1872.

(Endorsed:) U. S. circuit court, northern district of New York, in equity. Hoyt Post, assignee, &c., vs. Henry Michaels et al. Stipulation. F. A. Macomber, sol. for complain't. Filed October 26, 1872.

25 Circuit court of the United States in the northern district of New York.

HOYT POST, ASSIGNEE OF HARLOW E. MACARY and HENRY S. MACARY, bankrupts,
vs.
HENRY MICHAELS AND NATHAN LEVI.
} In equity.

This cause came on to be heard upon pleadings and proofs at the last June term of this court, and was argued by counsel; and thereupon, upon consideration thereof, and at the term of said court, held at the city-hall, in the city of Albany, on the 8th day of October, 1872, in said district, it was ordered, adjudged, and decreed as follows: That the complainant have the relief prayed for in the bill of complaint, and for the recovery of *of* the proceeds of the sale of the stock of goods late of the bankrupts as in the bill mentioned, being $3,482.39, with interest thereon, or if the complainant so elect for the recovery of the value of the goods, in which case a reference will be ordered to ascertain
26 such value; and, further, that the complainant recover his costs of suit, and that the defendants be debarred any share in the estate of the bankrupts in the hands of the complainant as assignee, which said order has been duly entered in the office of the clerk of this court. And the said complainant, not having elected to take a decree for the recovery of the value of such goods, but having, on the contrary, made and filed, by his solicitor and counsel, a notice in writing that he does not so elect:

Now, on motion of Mr. F. A. Macomber, the solicitor and counsel for said complainant, it is adjudged and decreed that the said complainant recover of said defendants the sum of three thousand four hundred and eighty-two dollars and thirty-nine cents, with interest thereon from the 25th day of October, 1869, which said interest amounts to the sum of seven hundred and thirty-one dollars and thirty cents, amounting in the whole, of principal and interest, to the sum of four thousand
27 two hundred and thirteen dollars and sixty-nine cents, ($4,213.69.)

And it is further adjudged and decreed that the said defendants, and each of them, be and they are hereby adjudged to have lost any and all claim to any share or dividend in the property of said bankrupts, or in any property, money, or effects obtained by said complainant, or to be obtained by him by virtue of this decree, and that they and each of them be and they are hereby debarred any share in said estate of said bankrupts in the hands of said complainant as assignee as aforesaid.

And it is further adjudged and decreed that said complainant recover of said defendants his costs of suit, amounting to the sum of one hundred and ninety-six dollars and fifteen cents, and that he have execution for such costs and for the sums above decreed.

Wherefore the costs of the complainant are taxed at one hun-
28 dred and ninety-six dollars and fifteen cents. Whereupon the said pleadings, order, final decree, and other papers required, are now attached together and hereto annexed, and the said decree is signed and enrolled according to law.

Judgment signed and decree enrolled this 30th day of October, 1872.

CHARLES MASON, *Clerk.*

29

30 (Indorsed:) U. S. circuit court, north. dist. of N. Y. In equity. Hoyt Post, assignee, &c., vs. Henry Michaels and Nathan Levi. Enrolled decree. F. A. Macomber, compl's sol'r. Damages, $4,213.69; taxed costs, 196.15—$4,409.84. Filed October 30, 1872, 3 o'clock p. m.

31 The circuit court of the United States for the northern district of New York, in equity.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF HARLOW E. MACARY and HENRY S. MACARY, complainants,

vs.

HENRY MICHAELS AND NATHAN LEVI, DEFENDANTS.

Testimony taken in the above-entitled cause before the undersigned, F. H. Canfield, as special examiner, by consent of counsel for the respective parties, commencing September 27th, 1870, at the city of Detroit, Michigan. Mr. Pond and Hoyt Post in person appeared for the complainant, and Mr. Benedict for the defendants.

ADAM T. MACARY, a witness produced and sworn on behalf of the complainant, testifies as follows:

I live at Coldwater, Michigan. I am 57 years of age. I am the father of Harlow E. Macary and Henry S. Macary, and the petitioning creditor on whose petition they were adjudged bankrupts. They were engaged in the clothing and tobacco business together. They com-
32 menced business in Hudson, Michigan, I think two years ago last August (August, 1868,) and they continued until the last of October, 1869. I let them have money to go into business with, in all $2,500, of which $300 was repaid. I let them have the money on the 10th or 11th of August, 1868. The $300 was repaid some time during the fall of that year. That is all that has ever been paid of the $2,500. In October, 1869, I resided at Coldwater. My sons were then in business at Hudson. I am a little acquainted with the defendant Michaels. I never saw him but once to know him, and that was at Coldwater some time in October, 1869. My son telegraphed to me to be at home. This was the first I knew of the affair. I believe Henry's name was signed to the telegram which was sent from Hudson to me at Coldwater. He came up on the train from Hudson to Coldwater in theafternoon, a little after dinner, on the same day that I got the telegram. I think it was Tuesday or Wednesday—somewhere along there. He came to my house and said he wanted me to go down town to Mr. Shipman's office,
33 that Mr. Michaels was there. I went there as he requested, and was there introduced to Mr. Michaels. Mr. Michaels commenced canvassing about the boys & matters at Hudson. He said to me, "I have been at Hudson looking over the boys' matters & I find they

have taken an invoice of the stock, & I find they have between four and five thousand dollars worth of stock." He said the invoice is something over four thousand , and that they owed some seven or eight thousand dollars. I think that is the amount which he stated. He said "They tell me they owe you twenty-two hundred ." He said that he had been to Hudson & made the boys a proposition, which was this: that they shall sell me the stock of goods if you will sign off your claim to me. I will buy this stock of goods, & the boys shall go on & do business in Mr. Sloman's name; & he stated that he would furnish all the goods they could sell. What I have stated is a proposition Mr. Michaels made to me, that the boys should sell him the goods & retain the store just as it had been, & the boys should have the profits. I ought to have stated that when he made the proposition
34 to buy the goods and continue the store in Sloman's name, I asked him, "Suppose he didn't fulfill his contract;" then he says to me that "your receipt will be good for nothing," & I asked him what would become of the other creditors. Then he says, "The boys should have the profits of the goods to pay the other creditors. He named some of the creditors at that time. He turns to my son Henry & says, "You have confidence that I will do as I agree; haven' you ?" and then he says "The boys shall have the profits of the goods to pay all their other debts, and I will have Sloman go to Hudson to-morrow, & the boys shall make out a list of the goods they want, for they can't do business with the stock they have got, & they shall forward the list of what they want on to me at Rochester." Said I to him, "Does Sloman understand this, & will he do this thing ?" He replied "Sloman will do just as I tell him." Then he says to me, "Hudson's not a good place to do business. The fall business will now commence, but I think they had better stay there until January, & in the mean time I will
35 have Rudolph, my agent, look them up a better place." He again said they should go on and have the profits to pay up their creditors. Then I said "They might eventually pay me; I was willing to wait till all the rest were paid." I said something to him about putting this into writing. He says "That won't do; it would look bad on the face of it." He made out a kind of a receipt which I signed. Then he had Sloman come up into the office. Henry Macary, Michaels, & myself were present during the conversation thus far. Shipman was in the office when we went in, but he went out & was not present during the conversation. We were there a couple of hours before Sloman came in. We left the office, & I went to supper, & went back to the office again, when Michaels brought Sloman in. I signed the receipt after I returned from supper. Mr. Michaels had Shipman draw up a bill of sale, I think, before supper; he drew two or three, but they were torn up as they did suit Mr. Michaels. I saw them before they were torn up; they consisted of a few lines only. Michaels objected to them
36 because they called for the full cost-price of the goods. Mr. Shipman says to him, "I think you stated the invoice-price at $4,200," and Michaels says, "No one would take the goods at the full cost-price; it would look bad if I did." Says Shipman, "How much, then ?" Michaels said, "About seventy-five cents on the dollar," which made about thirty-six or thirty-seven hundred dollars. The bill of sale was finished before we went to supper. All the papers were made before we went to supper but the notes. A receipt in full for the boys was made out; also a bill of sale of the goods, & a paper which I signed, which suspended my debt; but none of them were signed before we went to supper. It was agreed that we should go back to Shipman's office after we got sup-

per. Sloman had not been there in the office up to the time we left for supper. After the papers were drawn up Michaels said that he proposed Sloman should give him his notes at 3, 6, 9, & 12 months for the goods. Then we went to supper. When we came back, Michaels brought Sloman; Shipman, Sloman, Michaels, Henry Macary & myself
37 were there present. Shipman was going to draw some notes for Sloman to sign, & Michaels said to Sloman, "You have your note-book, have you not?" Sloman said, "I propose to pay the first note in cash;" and he took out his pocket-book & paid one-fourth of whatever the amount was to be—some six or seven hundred dollars. Then Sloman took from his pocket his note-book & drew three *months* at six, nine, & twelve months each for a fourth of the amount. Then Michaels says to him, "You hand the notes & money to Henry, & Henry will give them to me." The notes were signed & with the money handed to Henry Macary, who handed them to Michaels, who gave to Henry a receipt in full, signed in full for the indebtedness to Michaels & Levi. I don't know who took the bill of sale, or whether it was signed. I signed the paper which was prepared for me to sign. I heard it read. In preparing this paper, four or five lines were written, then a space of two or three lines left blank, & then about half a dozen lines were written. This was its condition when I signed it, & I
38 regarded it with suspicion at the time. Something was said about paying the other creditors at Rochester by me, & Michaels laughed at it, & said they could do nothing. I think the interview at the office after supper lasted about an hour or hour & a half. The paper now shown me is the receipt referred to signed by Michaels & Levi, a copy of which is hereunto annexed, marked "Exhibit A."

Cross-examination by Mr. Benedict:

I loaned the $2,500 at one time. I knew Louis Sloman prior to October 25, 1869. I did not see him on that day till after these papers had been drawn. I do not know whether my son Henry had seen him. Mr. Michaels did not profess to represent the Rochester creditors. Shipman was in his office when we first went there on October 25; think nothing was said on the subject of this sale in his presence. He said *said* when we went in, "You don't want me here," and Michaels said "No." He then went out. The subject of the business was not mentioned in Shipman's presence. Michaels commenced the con-
39 versation. He said he had been to Hudson & looked over the stock of goods. This was the first he said, & that he had taken an invoice of the stock. We did not have a list of the creditors before us while at Shipman's office. My son Henry did attempt to give a list of the debts or names of the creditors. He had nothing to say about it. He did not enter into the conversation at all at that interview about the stock, or what should be done with it. The conversation was entirely between Michaels & myself. Shipman went from the room where he was when we went in into another room of the office. He was out and in several times to get some papers, but did not have any conversation about the business. He came into the office before supper, & drew several papers before supper. Michaels called him. There was no general conversation about the business in the presence of Shipman before the papers were drawn. Michaels stated to him what papers were wanted. I gave no directions respecting them. No
40 arrangement was made that Sloman should take possession of the stock. I did not understand Sloman's making the purchase. I understood that Michaels was making the purchase. The object was,

as I understood it, that Michaels & Levi should get their pay out of the boys. I consented to it under the condition that if I would give this receipt, he would take the stock & the boys should do business in Sloman's name, & and that goods should be ordered in Sloman's name, who was to order the goods for the boys. Nothing was said as to who should be responsible for the goods. I suppose the object of having the boys do business in Sloman's name was to keep the other creditors from coming on to them. After supper Sloman was present with us. All the papers were drawn before supper. The bill of sale was drawn but not signed before supper. I don't know to whom it ran. I think it was the same that was executed after supper without alteration; also the receipt signed by Michaels & Levi, & the paper which I signed. I think
41 Shipman drew this paper. I signed but one paper. I took proceedings against the boys in bankruptcy, & they were declared bankrupts on my petition. I said something to them about it before I filed my petition. They did not go with me to consult with counsel. I think one of them was present with me at Sawyer & Beane's office; think it was at the time when Shipman was there; think it was Harlow. Don't know that he was there for anything in particular. He had nothing to say about it. He was in the office when I went there. Don't know there was any agreement between the boys & me about taking the proceedings in bankruptcy. I told them I was going to do it. They did not object, as I know of. They did not advise me to do it. They said I could do it. At the commencement of the proceeding the matter was frequently talked over by me and the boys. Harlow lives in my family now & has been there since they broke up in Hudson last fall. He is doing nothing at present. He has been in a store at Coldwater as clerk. He has taken no active part in the bankrupt proceed-
42 ings. I don't know any of the creditors of the boys or what they owe. I now remember the names of Mowry & Co., who are creditors. I knew there were other creditors at the time of commencing the bankrupt proceedings. About the time the proceedings were commenced, & before they were commenced, I asked the boys for the names of their creditors, & they gave them to me. I then told them I was going to commence these proceedings. They made no opposition at any time, & did not appear in the case. Sawyer & Beane were my counsel in the proceedings. I don't know who signed the assignee's bond. I have secured the assignee against costs in this suit, & signed an agreement to that effect, by which I assume all the responsibility of this case.

Re-examined by Mr. Post:

Henry Macary must have come directly from the cars to my house. I judge so from the time. He went to Shipman's office with me. Michaels did not come with Henry to my house from the cars. I think we found Michaels at Shipman's office with Shipman when we went there
43 the first time. I first talked with either Sawyer or Beane about the bankrupt proceedings. They were the first parties I talked with about it. It was after seeing them that I talked with my sons about the proceedings.

SEPTEMBER 28TH, 1870.

Recross-examination of A. T. MACARY by Mr. Benedict:

I think I first learned of my son's indebtedness to Mowry & Co. about the time I started to file the petition in bankruptcy. I have not in mind now when I did first learn of that debt.

Q. How did you learn it, or from whom?
A. I think from one of the boys, but can't say which.
Q. Are you unable to say from which you learned it?
A. I am unable to say. I think he told me at Hudson.
Q. At what place in Hudson?
A. I can't say; I don't remember.
Q. Was it not made to you in the office of Sawyer & Beane, your attorneys?
A. It was not.
Q. Are you positive it was not made in that office?
A. I am pretty positive it was not made there first.
Q. Why do you think so?
A. Because I had some conversation with them going from the store to their house. I was asking them some questions about some
44 of their matters; then I think they told me of this debt.
Q. Did you on the same day consult with Sawyer & Beane about bankruptcy?
A. I think I did.
Q. Did either of your sons accompany you to consult with your lawyers?
A. I think they did; I took them over there.
Q. Was there a statement made at that time to the attorneys of the case?
A. I think there was.
Q. By whom?
A. Well, I made statements, as far as I knew.
Q. Give us what you stated to your attorneys at that time, & in the presence of the sons.
A. I think my sons were in another room at that time. I made the first statement to Mr. Howell, who was one of my counsel.
Q. How did you state the case to him?
A. Sawyer & Howell were both present, & Mr. Beane was in the other room where the boys were. I told him I saw Michaels at Coldwater—that he had been to Hudson & seen the boys, & he had made them a proposition to buy the stock of goods.
Q. Did you state to your counsel the facts as you stated them yesterday?
A. I am pretty positive that I did.
Q. Did you, on that occasion, call on your sons for a statement,
45 or were they called upon for that purpose?
A. I don't remember that I did, but think that one of the counsel asked them some questions.
Q. Was the question then before the counsel as to the propriety of instituting bankruptcy proceedings against your sons?
A. Yes.
Q. When did you first learn that Mowry & Co. had a mortgage on the stock?
A. I think when we were going from the store to the house.
Q. Which of the boys told you of the mortgage?
A. I think it was Harlow.
Q. Did he tell you how much it was?
A. I think he did.
Q. When did you learn that they had attempted to sell out to Mowry & Co.?
A. I never heard anything of the kind.

Q. When did you learn they attempted to sell out to any person other than Michaels?

A. I never knew they attempted to sell to anybody.

Q. Did they state to you on that occason they were insolvent at the time the mortgage was executed?

A. No, sir.

Q. Did they make any statement as to their ability at that time?

A. I think Harlow said that if they were let alone they could work their way out.

Q. Was that all that was said on that subject?

A. I think it was at that time.

46 Q. Did he not say they were able to pay their debts when they executed that mortgage?

A. I understood him that he thought they were, or would be.

Q. Did you believe him?

A. Certainly I did; I never knew him to tell me a lie.

Q. Did you at that time believe that your sons, in the execution of that mortgage, intended to commit a fraud upon their creditors, & to evade the provisions of the bankrupt act?

A. I can't say that I did.

Q. Do you now believe that, in the execution of that mortgage, your sons intended to commit a fraud upon their creditors?

A. No, sir, I don't think they did.

Q. You understood it was a mortgage given to secure a debt from your sons to Mowry & Co.?

A. Yes, sir.

Q. Were you present when the notes of Mr. Sloman, & the money paid by him for the stock, were paid to Michaels?

A. Yes, sir.

A. And also when Michaels gave to the boys a receipt in full for his debt?

A. Yes, sir.

47 Q. It was done with your concurrence at the time, was it not?

A. Yes, sir.

Q. You understood, did you not, that it was a compromise of the amount due Michaels & Levi?

A. Yes.

Q. Did your sons, or either of them, accompany you to your counsel in the bankrupt proceedings?

A. Not after the first time.

Q. Were not the bankrupt proceedings commenced on the suggestion of your sons, or one of them?

A. No, sir.

Q. Had you in your mind when you went to your counsel at first what proceedings might be taken?

A. No, sir; I did not know what course to pursue.

Q. Was it decided or advised while you were all there present that the proceedings should be bankruptcy?

A. The counsel advised me at that time that that was my only course, & it was then decided upon.

Q. Did you & your sons leave the office together?

A. I think not; they went out before I did.

Q. Are you certain of that?

A. I am quite sure.

Q. Where did they go?

A. I can't say.

Q. How soon did you see them again?

A. I can't say if it was in the forenoon or after I took dinner with them at their house, after this interview with counsel.

48 Q. Everything is friendly between you and the boys, & always has been?

A. Yes, sir.

Q. Did you not go to the office of these attorneys with the idea that some proceedings for redress would be commenced in the name of your sons?

A. No, sir, I don't think that I did.

Re-examined by Mr. Post:

Q. Do you mean to be understood that at the time you commenced the bankrupt proceedings that you supposed that your sons, at the date of the giving of this mortgage to Mowry, were able, in the ordinary course of their business, to pay their debts as fast as they became due?

A. No, I did not suppose so.

Q. Was their indebtedness to you, as above stated, then due?

A. Yes, sir.

Q. Had they the money to pay it?

A. No, I think not.

Q. What did you then suppose was the object in giving the mortgage to Mowry?

A. To secure a debt they owed him.

Recross-examination:

49 Q. How do you know they had not the money to pay you?

A. I judged so from circumstances.

Redirect examination:

Mr. Sloman was engaged in the clothing business in his own name at Coldwater on October 25th, 1869.

(Signed) A. T. MACARY.

Subscribed and sworn to before me this 28th day of September, 1870.

(Signed) F. H. CANFIELD,
Special Examiner.

"EXHIBIT A."—*F. H. C., Special Examiner.*

Rec'd Oct. 25, 1869, of Macary Bro's, $3,482.39, as follows, in cash, $870.59, the balance in three notes of $870.60 each, at six, nine, and twelve months, signed by Louis Sloman, in full of all demands to date.

October 24, 1869.

(Sig'd) MICHAELS & LEVI.

[U. S. int.-revenue-stamp., 5c, duly cancelled.]

HARLOW E. MACARY, a witness produced and sworn on behalf of the complainant, testifies as follows:

I am one of the bankrupts named in the title of this cause. I am 26 years of age, & live at Coldwater, Michigan. My brother Henry S. and I were in business together from August, 1868, at Hudson, Michigan. Our firm-name was "Macary Brothers." We continued in business till October 25th, 1869. Our business was that of clothing, hats, caps, & gents' furnishing-goods. On & prior to October 25th, 1869, we had a

stock of these goods worth $5,000; may be a little over. This was the cash value of the goods. The indebtedness of the firm was be-
50 tween six and seven thousand dollars; I can't state the exact amount. Our creditors were Michaels & Levi, of Rochester. Our actual indebtedness to them was not over $2,000; I mean the amount then due them. We owed them in all about $4,500. John Sabey & Co., of Rochester, whom we owed $368.75; Bier & Stone, of Rochester, $415.74, Sloman & Rosenthal, of Rochester, whose debt was three hundred & some odd dollars—it was $344.16; A. Judson, of Chicago, whom we owed $84.56; Potter & Smith, of Boston, $7.50; A. T. Macary, of Coldwater, whom we owed ($22,000) twenty-two hundred dollars. We also owed smaller claims, amounting to about $325 or $350. I owed a couple of small debts individually of $10 and $12 each. About $23,000, besides what was due A. T. Macary, was due on the 25th of October, 1869. Some of the smaller accounts were running accounts. The goods were purchased at 30, 60, & 90 days, & at 4 & 6 months. The clothing, hats, caps, & furnishing-goods were bought about the same time, about the 1st of October. I know the defendant Michaels.
51 I saw him in October, 1869—on Sunday, the 24th of October—at our house in Hudson. I was sick from a hurt at a fire & had not been out since Wednesday previous. My brother went to the hotel & got him & he came to the house about half past two o'clock p. m. My brother & I were keeping house together. They came from the hotel together. He was there till after four o'clock, or about two hours. Michaels, my brother, my wife, & I were present during all the conversation had at my room. I was lying on the bed. After passing the time of the day, Mr. Michaels said he wished to talk with me in regard to the business between Michaels & Levi, & Macary Brothers, & I said, "Very well." He then told me that he had been looking over the stock of goods & that we were running behind. I asked him when he looked it over, and he said Friday & Saturday. He then said he had invoiced it & found that it invoiced $4,600 & upwards, & that was about what we owed Michaels & Levi. He then told me that he had been talking with my brother about buying the stock, & that he had made him a proposition to buy the stock through a third party; that he would keep the store stocked; we should sell the
52 goods, & the profits, after paying the expenses of the store, should be ours. He then asked me what I thought of it. I told him I could not say, for it was all new to me; I would think of it till Monday, when I would come down to the store. He asked me when I would be there, & I said about 8 o'clock Monday a. m. The next thing we were called to dinner, & in the presence of my brother, his wife, his mother-in-law, my wife & myself & the baby, Michaels said, "Boys, I will do with you just as I have agreed in the conversation we have had." This was at the table. Mr. Michaels took dinner with us. Somebody, but who, I can't recollect, asked what the consideration was. Michaels said, "The boys are hard up & I propose to buy them out, keep the store in Hudson, & stock it, so that they can have a chance to get straight, as now their expenses will be light because you have got everything to keep house with & prospects of a good trade." He said, "I think it is a good idea, don't you?" Nobody made him any reply. I think this is all that was said at the time in regard to the busi-
53 ness. After dinner Michaels & my brother went down to the hotel. I saw him the next day about 9 o'clock at the store. He came to the store. I & my brother were present when he came in. He took a seat by the stove, as did I & my brother, & he asked me if I had

thought of his proposition. I said, not much, but I would like to have it again. He said, "Boys, you are bad off, & I want to help you all I can. You sell this stock of goods to me through a third party. I asked him if David Bovie, of Coldwater, would do. He said "No; it must be somebody of my own selection—Louis Sloman, for instance." I told him "No; I thought I ought to have a little choice." Michaels said, "You will do as I say." I said "I guess not, but state your proposition through." He said, "You sell this stock of goods to me; I will fill up the store with goods & keep it stocked; you boys sell the goods, pay the expenses of the store, & the profits shall be yours. We will keep the store in Hudson until the first of January in your name, ordering what goods you want through a third party. Do the best you can, and in the mean time I will have my man, Rudolph Lichten-
54 stein, find another place to move the stock to, for I do not think it will pay here after the first of January; the store to be run the same as in Hudson. This will give you a chance to make yourselves whole." I asked him what I should do when my other creditors presented their bills when they came due. Michaels said, "Pay no attention to them; they can't collect them." I told him, "I did not like to do it, as it was in reality throwing us out of business." He said, "No, he would do just as he agreed." He asked if we had not confidence in him. I made him no reply. My brother said, "Certainly we have." Michaels said "Let us go to Coldwater then." I asked him, "What for?" He said "To see your father, A. T. Macary." I asked him "what he wanted to see father for." He said "To assure him that he did not want to wrong us, & so that father would not give us any trouble, he being one of the creditors." I then asked him "In case we sold to him who we should order our goods through." He said "Through Louis Sloman." I asked him if Sloman understood this matter. He said Sloman did understand it, & that Sloman would do just as he told him to, that he was nothing only a machine
55 for him. I asked him again if Sloman thoroughly understood it. He said he did, & that Sloman would do just as he told him. I asked my brother if he was satisfied with the proposition. He said he was, & that he considered it safe. I then took my brother to the front end of the store, & after we had talked together, Michaels said, "Henry, let you & I go to Coldwater on the noon train." My brother said to me, "Harlow, you go." I told him I did not feel able. Michaels then said he wanted Henry to go, & he also asked me for a statement, in writing, authorizing my brother to sign my name to any sale, transfer, or assignment that might be made at Coldwater. I gave him such paper, which was drawn up by Michaels. I signed it, & Michaels put it in his pocket, & I then asked Michaels, "Are you sure this is right?" He said, "Yes, it secures us"—meaning Michaels & Levi—"now you will do business." After a remark, which I don't remember, there was very little conversation. I knew a telegram was sent to my father at about half-past eleven *eleven* o'clock. This is all that was said to me. I went to dinner, & after I came back Michaels & my brother
56 started for the depot. As he was starting he turned around & said, "I will have Sloman come down & see what goods you want so that you can order them." He then said, "Good day; I shan't probably see you again." I have not seen him since.

SEPTEMBER 28, 1870.

HARLOW E. MACARY recalled for further examination by Mr. Post:

Q. When did your brother return from Coldwater?

A. Monday night or Tuesday morning early. I don't know that Sloman came with him. He came to Hudson. I think he was there Tuesday.

Q. What took place with Sloman?

A. He said he had come to find out what goods we wanted, so that he could order them for us.

Q. What did you do then?

A. After some conversation we proceeded to look over the goods & make an estimate of what was wanted, & make a memorandum of what we wanted.

Q. Did Sloman assist you in making that?

A. Yes, sir; he made some suggestion of different articles.

Q. What was done with the memoranda?

A. Sloman took it & put it in his pocket.

Q. How long was he at Hudson?

A. I think he was in the store two hours and a half or three.

57 Q. After he went away when did you next see him?

A. On Saturday of the same week.

Q. In the mean time did you receive any communication from him?

A. Yes, sir, I did.

A paper is here shown to the witness, and he is asked, "Is that it?"

A. Yes, sir.

Said paper is here offered in evidence, & with an envelope is hereunto annexed, and marked Exhibit B.

Q. Is that the envelope in which the communication came?

A. Yes, sir.

Q. Where did you see him on Saturday?

A. At our store in Hudson.

Q. What then occurred?

A. The first thing he wanted to know what we were going to do with the mortgage on the stock of goods. I told him I did not know, that we wanted to fix it some way. He said, "Suppose you transfer your book-accounts to me towards it." I told him I did not think there was enough to clear it. He said give him what there was, & he would fix the balance.

58 I transferred the book-accounts to him. He then wanted that I should turn over to him a cow that I owned. I told him, "No, sir; not so long as my name was Macary." A little while previous to this the proceeds of sales for part of the week I gave to Sloman for Michaels & Levi. Sloman then said, "I propose to move this stock to Coldwater." I asked him why. He said he owned it. I asked him how he got it. He said he bought it of Michaels. I asked him where & when. He said in Coldwater, last Monday—meaning Monday, the 25th of October. I told him that I did not understand it so. He said that made no difference, he proposed to move that stock of goods that day. He ordered myself & my brother to help Mr. Dumon, his clerk from Coldwater, to pack up the goods that day. I told him there would be no goods packed that day in that store. He told Dumon to go to packing up the goods. I forbid them both from touching a dollar's worth of goods, & the result was that Sloman demanded the goods, which I refused to grant, & subsequently I locked up the store; after which the sheriff broke open the store & took possession of the goods under a writ of replevin, & has held them ever since. This replevin

59 suit was in behalf of Sloman, as plaintiff, & the goods were delivered to him by the sheriff. I did tell Michaels, at our interview on Monday, there was a mortgage on the goods to Mowry & Co. I intended to say this in my testimony yesterday, but it escaped my memory. Our firm owed Mowry & Co. the amount named in the mortgage—$400—at the time it was given. It was given at the time it bears date. The debt secured by the mortgage was afterwards reduced to $355, the amount mentioned in the schedule filed in the bankrupt case. At the date of giving of this mortgage I think we were solvent.

Q. Supposé solvent means being able to pay your debts in the ordinary course of your business as fast as they became due, were you solvent?

A. I think we were.

Q. Were you at the time indebted to your father, & was that debt due?

A. I suppose it was due at any time he had a mind to call for it.

Q. Was the debt to Mowry & Co. due at that time?

A. Yes.

Q. Did you owe anybody else whose debts were then due?

60 A. We owed Michaels & Levi, & something was then due to them. I can't say how much.

Q. State what means you had for paying these debts.

A. We had the stock in the store, & I think there was some money in bank, but not much, not enough to pay Mowry & Co.

Q. What was the value of your stock?

A. The clothing stock was worth between three and four thousand dollars, at cost price.

Q. What other means had you to pay your debts?

A. I had nothing, nor had the firm.

Q. Why was not the money paid Mowry & Co., instead of giving the mortgage?

A. Because I wanted to send the money in the bank East, where I thought it was due.

Q. Did you have the money to pay Mowry & Co.?

A. No, sir.

Q. While Michaels was at your store did he have access to the firm-books?

A. He did.

Q. Do you know that he examined the ledger?

A. He said he had examined the books.

Q. State whether the indebtedness of the firm was entered upon the books.

A. It was in the accounts kept with the parties we dealt with.

Q. Was this indebtedness to Mowry & Co. entered upon the books?

61 A. Yes, sir.

Q. State whether there was any talk about the debt Mowry & Co.

A. I told him there was a mortgage on the goods.

Cross-examined by Mr. Benedict:

Q. Has the replevin case been tried?

A. I suppose so, but I was not there, & have no knowledge about it. I did not attend on the day of trial.

Q. Did you go with your father to Sawyer & Beane's office at the time he contemplated the bankrupt proceedings?

A. I think not.

Q. Were you ever there when the subject of such proceedings were discussed?

A. I think not.

Q. Are you quite sure of it?

A. I do not recollect ever hearing any conversation between them about the bankrupt matter.

Q. Did you advise your father to take the proceedings?

A. Can't say positively, but think not.

Q. Did he talk with you about it before he commenced it?

A. I think not.

Q. Nothing said between you & him before he commenced them?

62 A. I think there was nothing.

Q. Then you were surprised when the papers were served on you, were you not?

A. Yes, sir.

Q. That was the first that you heard from any quarter that such proceedings should be taken?

A. Nothing but a hint that was given me. I knew nothing positive.

Q. What was the hint, & who gave it to you?

A. Mr. Sawyer said to me, "The first time you see Mr. Shipman tell him you are being thrown into bankruptcy & see what he will say about it." This was the first I heard of it.

Q. That was all you knew or heard of the bankrupt proceedings till the papers were served on you?

A. I think it was.

Q. And you say you had no intimation as to who was commencing the proceedings?

A. I am not positive.

Q. At the time you gave that mortgage had you money enough to pay that debt?

A. No; I don't think we had.

Q. You had a stock of tobacco?

A. My brother had, but I had no interest in the tobacco.

Q. The mortgage was given for a partnership debt & on partnership property?

A. Yes, contracted in the tobacco trade.

63 Q. You said that the ready-made clothing at the time the mortgage was given amounted to three or four thousand dollars; how much was the hats, caps, &c.?

A. I intended to include the whole as worth that sum. I have no idea of the amount we owed when we gave the mortgage.

Q. You are sure you told Michaels there was a mortgage on the stock?

A. I know I did.

Q. When & where did you tell him?

A. At our store in Hudson, Oct. 25th.

Q. Did you tell him that was all the debts you owed?

A. I did not tell him or pretend to tell him.

Q. Did he assume & agree to pay the mortgage?

A. Nothing was said to me who should pay it.

Q. How much did you owe Michaels & Levi on that day?

A. About $4,500.

Q. Did he agree to take less than the amount?

A. No, sir.

Q. Did not agree to take about $3,800?

A. No, sir.
Q. Nothing was said about taking less than was due him at any time?
A. No, sir.
Q. Was there any time agreed upon that the store was to be conducted as you have described?
A. He agreed that he would keep the store stocked, & we should
64 run the store till we got all the creditors paid off, including my father, & then the stock should revert to Macary Bro's, & we buy our goods in our own name.
Q. When was Sloman to have his money refunded?
A. I did not understand anything about Mr. Sloman.
Q. Prior to Michaels & your brother going up to Coldwater was there not something said about Sloman's making the purchase?
A. Yes, sir.
Q. Was it understood that he was to make the purchase?
A. Not by me.
Q. Did you commit the whole thing to your brother when he went to Coldwater to do what he & your father saw fit as to the sale of the stock?
A. Yes.
Q. Did you direct your brother to consult with your father?
A. Don't think I did.
Q. When & where did Michaels tell you he had examined the books?
A. On Sunday the 24th, at our house; also at the store on the 25th.
Q. Did he say anything about the books, what they showed?
A. Do not recollect if he did or not.
65 Q. Were there any figures made on paper in estimating your pecuniary condition?
A. Not to my knowledge?
Q. Are you certain that Michaels himself proposed to buy you out?
A. Yes, he proposed to buy us out himself.
Q. When, by that arrangement, were Michaels & Levi to be paid?
A. Certainly when the goods passed into the hands of Michaels. Their debt was to be paid by the transfer of the stock.
Q. What was said, if anything, about his receipting their debt in full?
A. Nothing was said that I know of.
Q. Was anything said about Sloman having the direction of the business?
A. We were to order goods through him.
Q. Was that all he was to say or do about it?
A. We were to order goods through him; & that was all that was said by Michaels. I & my brother were to have entire control of the business.
Q. Do I understand you to say that you heard nothing said about Sloman's buying the stock prior to your brother's going to Coldwater?
A. Nothing except that his name was proposed as a third party to buy the stock, & objected to by me, as I have already stated.
66 Q. You did not understand at any time that Michaels was to take a transfer to himself, either individually or to their firm?
A. I understood that the transfer was to be made to Michaels, of Michaels & Levi, & that they would be the purchasers.
Q. That was your understanding when they left for Coldwater?
A. Yes, sir.
Q. I understand there was no limitation as to the time you should run the store, other that you have stated?

A. No, sir.

Q. On your brother's return from Coldwater, did he tell you what he had done?

A. I think he did.

Q. Have you been active in the prosecution of this suit?

A. No, sir, I have not.

Q. Have you done anything about it?

A. No, sir.

Q. Were you subpœnaed to come here?

A. I was not. I came on a request.

Q. On whose request?

A. On the request of the complainant.

Re-examined by Mr. Post:

Q. What did you understand by Michaels' proposition to buy you out through a third party?

A. I did not know what he meant by it.

67 Q. In this arrangement, that was to be carried out when they went to Coldwater, what was said as to the proceeds of the sales of the goods?

A. Nothing was said by Michaels to me about it.

Q. Was anything said as to your having any part of the proceeds?

A. We were to have the remaining profits, after paying expenses of the store.

Q. From what were you to pay the other creditors?

A. From the profits, after paying the expenses of the store & living.

Q. At the time of the transfer, on the 25th of October, what other property or means had you, except what was so transferred?

A. The book accounts, two notes, & the general store-fixtures.

Q. What was the value of the book accounts?

A. Between three & four hundred dollars.

Q. What has been realized from them?

A. Nothing as I know of.

Q. Are the statements filed with your schedules in the bankruptcy case all the accounts which you had at the time of the sale on the 25th of October?

A. Those are not all of them. Some of the accounts were transferred to Sloman for Michaels.

Q. What was the amount of those accounts?

A. I think between eighty & a hundred dollars.

68 Q. What was their value?

A. A hundred cents on the dollar. I think they have never been collected.

Q. Give the names of the parties, & the amounts of the accounts that have not been collected.

A. H. C. Bliss, Kalamazoo	$37 00
Dr. Johnson, Toledo	2 30
A. T. Webber, Bellows Falls, Vt	17 60
L. E. Stuthen	29 82
Accounts on file	260 17

These accounts ranged from $26.50 to 65 cents. I considered these accounts, except Suthan's, as good, except about $50.

Q. What were the two notes you speak of?

A. One was given by L. E. Sutphen for $150. I think it was good; can't say how long it had been due. It became due in January, 1869. The other note was Geo. L. Hoisington, for $9.00, which has never been

A. No, sir.
Q. Nothing was said about taking less than was due him at any time?
A. No, sir.
Q. Was there any time agreed upon that the store was to be conducted as you have described?
A. He agreed that he would keep the store stocked, & we should
64 run the store till we got all the creditors paid off, including my father, & then the stock should revert to Macary Bro's, & we buy our goods in our own name.
Q. When was Sloman to have his money refunded?
A. I did not understand anything about Mr. Sloman.
Q. Prior to Michaels & your brother going up to Coldwater was there not something said about Sloman's making the purchase?
A. Yes, sir.
Q. Was it understood that he was to make the purchase?
A. Not by me.
Q. Did you commit the whole thing to your brother when he went to Coldwater to do what he & your father saw fit as to the sale of the stock?
A. Yes.
Q. Did you direct your brother to consult with your father?
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A. Yes, sir.
Q. I understand there was no limitation as to the time you should run the store, other that you have stated?

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presented. This note was good. The fixtures consisted of a show-case, two chandeliers of 2 lamps each, one side-lamp, a stove, & two chairs. They were worth about $50.

Recross-examination:

I mean to say the accounts were assigned to Sloman, for the benefit of Michaels, to help pay the mortgage.

69 Q. Had Michaels assumed the mortgage?

A. Not in the arrangement between us.

Q. Nor he had not proposed to to you?

A. No, sir.

Re-examined:

The goods, when disposed of, were subject to this mortgage.

Recross-examined:

There was no arrangement between me & Michaels that the stock should be transferred subject to the mortgage.

(Signed) H. E. MACARY.

Subscribed & sworn to before me this 28th day of September, 1870.

(Signed) F. H. CANFIELD,
Special Examiner.

MARY E. MACARY, a witness produced, sworn, & examined on the part of the complainant, testified as follows:

I am the wife of Harlow E. Macary, the last witness on the stand. I am 22 years of age, & reside at Coldwater. On 24th & 25th of October, 1869, I resided at Hudson. My husband & self & my husband's brother Henry & wife were keeping house together in the same house. I saw the defendant, Michaels, on Oct. 24th, 1869, at our house. He

70 came there with Henry S. Macary. I can't state the time of day. He staid to dinner, & went away soon after. I don't know how many hours he was there. He was up stairs in my room first, & afterwards was down stairs in the dining-room. While he was in my room, my husband & his brother Henry, Mr. Michaels, myself, & the baby were present. I heard a conversation between Mr. Michaels & my husband. I can't tell you just how the conversation began, but he said something about my husband being hurt, & spoke about having made a proposition to Henry S. Macary. He proposed to buy the stock of goods——

Q. What did Michaels say?

A. I am not good at remembering conversations in that way. He said, in substance, that he would buy out the stock of goods, & he said they (the boys) should stay in Hudson & continue in business as they had done heretofore—they to pay up the debts as fast as they could, &, after they got the debts paid, the stock of goods was to come back to them just as they had been in the first place. He proposed that they

71 should stay in Hudson to the first of January, & in the mean time Rudolph, Michaels' agent, was to find them another place to do business in, & then they would move the stock to the place Rudolph should select. There was some conversation which did not relate to the subject & a good deal which did relate to the business, to which I paid no attention. I have given the substance of what I heard. When we went down to the table, Michaels said the boys had got everything to keep house, & had been to their greatest expense, & he did not see why we could not get along, and come out all right, and pay the debts. Myself & husband, Henry Macary & his wife & his mother-in-law & baby were present.

Cross-examination:

Q. Have you stated the substance of what occurs to you of the conversation?

A. Yes, sir.

Q. Did you hear Sloman's name mentioned?

A. Yes, but can't tell how, or in what connection.

Q. Did you hear anything said as to the amount of indebtedness?

A. No, sir.

Q. Is your recollection distinct as to that you have stated?

72 A. It is.

Q. Did you hear anything said about going to Coldwater?

A. Don't think I did.

Q. Did the boys assent to his proposition?

A. Not as I remember.

Q. Did the conversation take the form of a general conversation about business?

A. It was principally between the boys and Michaels. Sometimes he spoke to me, but not about the business.

Q. You don't pretend to remember all that was said about the business?

A. No, I don't.

(Signed) MARY E. MACARY.

Subscribed & sworn to before me this 28th day of September, 1870.

(Signed) F. H. CANFIELD,
Special Examiner.

All the foregoing testimony was taken by consent of counsel for the respective parties, to be read at the hearing of said cause, subject to objection for irrelevancy or incompetency.

Dated September 28, 1870.

(Signed) F. H. CANFIELD,
Special Examiner.

Commissioner's fees, $26.00.

73 EXHIBIT B.—F. H. CANFIELD, *Special Examiner.*

COLDWATER, *Oct.* 28, 1869.

H. E. MACARY:

In my haste to get through in Hudson I lost a memorandum of what goods were wanting there. Make out a list of what goods are wanting, as near the other as you can possibly recollect.

Resp'y,

(Sig'd) L. SLOMAN.

L. Sloman, dealer in ready-made clothing and gents' furnishing goods, No. 23 Chicago s't, Coldwater, Mich. Postmaster please return.

"Exhibit B."
F. H. CANFIELD,
Examiner.

COLDWATER, Oct. 29, MICH.

H. E. MACARY,
Hudson,
Mich.

74 *Complainant's proof.*

In the circuit court of the United States for the northern district of New York. In equity.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Harlow E. Macary and Henry S. Macary, complainant,
vs.
HENRY MICHAELS AND NATHAN LEVI, defendants.
} December 12, 13, 14, & 16, 1870.

UNITED STATES OF AMERICA,
Northern District of New York,
County of Monroe, City of Rochester, ss:

Before Joseph D. Husbands, United States commissioner & special examiner. Be it remembered that, on the 12th, 13th, 14th, & 16th days of December, 1870, before me, Joseph D. Husbands, a commissioner appointed by the circuit court of the United States of America for the northern district of New York, in the second circuit, at the said city of Rochester, personally appeared the said complainant, Hoyt Post; and the said defendants appeared by Mr. O. M. Benedict, their solicitor & counsel, & the following witness, Henry S. Macary, is duly examined on his oath in the above-entitled suit on behalf of the said complainant, as follows:

75 The complainant appears in person; the defendants by Mr. O. M. Benedict, at Rochester, N. Y., December 12, 1870—3 o'clock p. m.

NORTHERN DISTRICT OF NEW YORK, *ss:*

HENRY S. MACARY, a witness produced, sworn, & examined on behalf of the said complainant, being first cautioned & sworn to testify the truth, the whole truth, & nothing but the truth in the said suit pending as aforesaid, doth depose & testify as follows, that is to say:

Direct examination by Mr. Post:

I am 23 years of age, & reside in Attica, Wyoming Co., New York. I am one of the bankrupts named in the title of this cause. I was a clothing merchant in 1869 at Hudson, in the State of Michigan. My brother, Harlow E., & myself were copartners. That copartnership business commenced August, 1868, & continued till October, 1869. I am acquainted with the defendants. I saw the defendant Michaels in Hudson, Michigan, October 22, 1869. He came to our store at that time, about 4 o'clock in the afternoon of that day. I had conversation with him then. No one was present with us. Mr. Michaels
76 came in the store. After passing the time of day to one another, he said he came there to look over the matters there a little between the firm & himself. He asked to be allowed to look over the stock of goods; I told him he might. After looking over the stock of goods, he said it was in good shape & was kept up good. He asked me about how much we had on hand. I told him we had between [illegible]0 & $6,000. He said he thought we had not got that much on [illegible]e asked me if I had any objection to his taking an inventory I told him I had none. Being late, we did not commence

it till next morning. Next morning I called off the goods to him, naming the articles & their cost-price, & Mr. Michaels put them down on a paper himself. After inventorying the stock he asked me in regard to our creditors, if we had any besides those that were in Rochester. I told him we had. He asked me who they were & where they were. I told him some were in Detroit; that one of the names was Mowry & Company, of Detroit, Michigan; one was John J. Bagley & Company, of Detroit, Michigan; also, A. Judson & Company. He then
77 asked me if he might look over the books of my firm, & also if he might take them to his room in the hotel, with the inventory he had made out. I told him he might. This was near noon of October 23rd, 1869. In calling off the goods I first gave him the cost-price of the goods delivered in the store, this cost-price including the freight. He then said he wanted the New York cost, without adding freight. This was soon after we commenced; thereafter I gave him the New York cost of the goods. He took the books & that inventory. I do not know what was done with the inventory. I have not seen it since. I do not know whether it was carried out, or footed up, or not. He returned the books the following Monday, October 25th. I saw him again on the 23rd October at the store. He came in the store & said, Henry, this is in a bad shape; you have not got as many goods in the store as I supposed you had. He then said, you have got about $4,400 or $4,500 of goods. I told him I thought we must have more. He said that was all the invoice figured. He did not show me the inventory or the footings. He asked me if I had any proposi-
78 tion to make with regard to settling with them. I told him I had not until I talked with my brother. My brother at that time was confined at home by an injury, & had not been in the store since the Wednesday before. Mr. Michaels said we had about stock enough to pay what we owed his firm. He asked me, if he should throw us into bankruptcy, how much I thought each creditor would get. I told him I did not know. He said to me, "Your father would get about ten cents on the dollar, & we would get about the same." He said "Henry, I don't want any underhanded game undertaken with me." I told him there was none; the goods were all on the shelf, & the books would show our accounts. He said, I don't want to injure you in any way or throw you out of business. He said, "I see no other way, unless I take the stock of goods & run the store myself until such time as I get my pay." I told him "I would do nothing until my brother was present;" I think then it was near six o'clock; & he went to tea. About 7 o'clock that day, 23rd, he came to the store & remained there till I closed for the night. Before we closed he said, "I will look these books
79 over more to-night, & you come to the hotel, at my room, to-morrow about 2 o'clock." He then asked me how much money I had on hand. I told him I did not know. He asked me if I had any objections to letting him have what I had, as it was best to make the amount I owed them as small as possible. I told him I had not, & counted him (J. D. H.) out & handed him what I had, I think $110. I then closed the store & went home. I went to the Comstock House next day, I think between one & two o'clock p. m. I went to his room & saw Mr. Michaels there. He asked me if I had any proposition then to make. I told him I had none. He asked me what we proposed to do. I told him I did not know what to do. He then said, "I have a proposition to make to you, that I shall buy the stock of goods & run the store in a third party's name, leaving you & your brother in the store, & to conduct the business the same as you have, & pay the expenses of the

store & remit the balance to him"—he said "to me," meaning himself. He had before said, in this conversation, "I will restock this store
80 with new goods & furnish you what goods are necessary to conduct the business, and in the mean time I will have Rudolph, my agent, find a better place for business than Hudson, & after the first of January we will move the stock to the place he shall select. I will restock the store with new goods at that place, and you & your brother shall conduct the business the same as you have done." He then asked me how the proposition suited me. I told him I did not know how that would do, but if we were not thrown out of business, it was satisfactory to me if the agreement was fulfilled. I then told him that we would have to see my brother before anything was done. Mr. Michaels & myself went to our house, where my brother was. My brother & I were keeping house together. We went up stairs to my brother's room & saw him. Mr. Michaels talked with him a few minutes about his getting hurt. Mr. Michaels told him he had made a proposition to me, & we had come there to talk with him about it. Mr. Michaels then stated the proposition over to my brother as he had stated it to me. My
81 brother then asked him, in case we should sell the stock to him, what would become of our other creditors, & what we should do in case they should present their bills. Mr. Michaels said, pay no attention to them, they can't do anything. Mr. Michaels then asked my brother who the third party should be. My brother proposed the name of David Bovie, of Coldwater, Michigan, who was master of our lodge. Mr. Michaels said, "I do not know him; it must be somebody that I know." He said "Louis Sloman, for instance." He said, "You know Louis, & he will do just as I tell him to." My brother said, "I think we ought to have some choice in this matter." Mr. Michaels said, "It don't make any difference what you think, it must be as I want it." My brother said, "Does Louis Sloman understand this, Mr. Michaels?" Mr. Michaels says, "He does; he will do just as I tell him." Mr. Michaels said, "Boys, I think this is the best thing you can do, & you will think so too after a little." He then said, "I think that one of you had better go to Coldwater with me & see your father Monday, so that
82 he will understand it & will not make you any trouble, as he is one of your creditors." We then went to dinner. While at dinner Mr. Michaels said, "Boys, I think you will come out all right now, that your greatest expense is over with; you have furniture to keep house with, & your expenses will be less." He said, "I have known cases a good deal worse than yours having come out all right." That was all that was said till Monday that I remember of now. Mr. Michaels asked my brother if he would be at the store Monday morning. He told him he would, about ten o'clock. Mr. Michaels went to the hotel.

Monday morning, October 25th, 1869, after my brother came to the store—I got there first—Mr. Michaels came in & returned the books. My brother then asked him to restate the proposition he had made the day before. Mr. Michaels restated his proposition as he had stated it the day before. I think my brother then asked him what would be done with a chattel-mortgage on the stock of goods that Messrs Mowry & Co., of Detroit, held on the goods. Mr. Michaels asked him how much it was. He told him it was about $400. Mr. Michaels
83 said he did not care anything about that; he would make that all right. Mr. Michaels then asked which one of us would go with him that afternoon to Coldwater. I asked my brother to go. He said to me, "You had better go; I do not feel very well." Mr. Michaels said, "Henry, I think you had better go; I want you to go." Mr.

Michaels then asked my brother to give him a writing authorizing me to sign the firm-name to any transfer or sale of the stock of goods that might be made at Coldwater. My brother gave him the writing he required. Mr. Michaels then said to me, "Henry, you had better telegraph to your father, so that he will sure to be at home." I did so telegraph my father. Mr. Michaels & I went to Coldwater that afternoon; it is about 40 miles west of Hudson. We had no conversation on the way that I remember.

On our arrival he said to me, "You go home & get your father & come to Mr. Shipman's office, & I'll be there." Mr. Shipman is an attorney. The train arrived at Coldwater between four & five o'clock. I left Mr. Michaels on the corner of Monroe & Pearl streets, & went to
84 my father's. I went to my father's house, & he & I went to Mr. Shipman's office together. We there found Mr. Michaels, & I introduced him to father. We went, father, Mr. Michaels, & myself, in a private office of Mr. Shipman's. Mr. Shipman was in his private office, but went out. Mr. Michaels then told my father that he had sent for him to talk with him about the matter between his (Michaels') firm & the firm of Macary Brothers. Father asked him what the difficulty was. Mr. Michaels said we were in a bad condition & he wanted to help us out; that he did not want to see us thrown out of business. Father then asked him what he proposed to do. Mr. Michaels told father he proposed to buy the stock of goods & run the store himself through a third party; that my brother & myself were to conduct the business the same as we had done; that he would restock the store with such goods as were needed, & keep it stocked; that we should keep the store in Hudson till the 1st of January, & during this time he would have Rudolph, his agent, find a better place for business than Hudson was, & would then move the stock to such a place as
85 Rudolph should select; that we were to receive the profits from the goods after expenses of the store had been paid, & he should receive his pay for the goods & we should have our living out of the profits on the sale of the goods. Mr. Michaels stated that we should go with the goods to this place & take charge of the business the same as we had done before. He then said to my father, in order to do this he (father) would have to withdraw his claim, so that he would not make us any trouble until such time as he, Mr. Michaels, had got his pay; then the stock should revert back to the firm of Macary Brothers, the same as it was before the sale was made. My father then said to Mr. Michaels, "Had I not ought to have some writing from you to show this?" Mr. Michaels said, "That is not necessary, as I have always done by the boys as I have agreed, & always intend to." Mr. Michaels then asked me if I had confidence in him that he would do as he said—as he agreed to. I told him that I had. Father said if Mr. Michaels did as he agreed it was all right. I think that was all that was said till Mr. Shipman came in & drew up some writings.
86 Mr. Shipman drew up 2 or 3 writings. He read them over to Mr. Michaels. They did not suit Mr. Michaels, & Mr. Shipman tore them up. He read those writings aloud. Mr. Michaels said they did not suit him, & he wanted them to suit himself; to suit him. He made some specialties about the writings, but I forget what. I think then Mr. Shipman said it was his tea-time, & we had better go to tea & come in after tea.

Adjourned, by consent, to December 13, 1870, at 9.30, at same place. December 12, 1870.

J. D. HUSBANDS,
Examiner and U. S. Commissioner.

ROCHESTER, *December* 13, 1870.

HOYT POST, *of counsel for complainant.*
O. M. BENEDICT, " " " *defendant.*

Direct examination continued by Mr. Post:

After tea, my father and myself went back to Mr. Shipman's office, and found Mr. Michaels & Mr. Shipman there. Mr. Shipman was writing a bill of sale. Mr. Shipman asked if the invoice that Mr. Michaels had should be the price of the goods. Mr. Michaels said, "No, it will not look well; it will look as though we intended to defraud the other creditors." Mr. Michaels said we had better make
87 it seventy-five cents on a dollar, so that it would look as though we did not mean anything wrong. Mr. Shipman then finished the bill of sale, & also drew up a receipt for my father to sign. Mr. Michaels then said, "I will go over to get Mr. Sloman to come over to the office;" & Mr. Sloman came to the office, & Mr. Shipman then read the bill of sale, & also the receipt, & then the papers were signed. I signed the bill of sale, & father signed the paper prepared for him to sign. Then Mr. Michaels asked Mr. Sloman if he had his note-book with him. He said he had, but he wished to make the first payment in cash. Then there were three notes drawn up for 6, 9, & 12 months. The price of the goods was divided into four equal parts & the cash was one of these quarters, & the notes were of equal amount. Then Mr. Sloman signed the notes, & handed the notes & the money to Mr. Shipman. Mr. Shipman handed them to Mr. Michaels. Mr. Michaels did not take them. He said, "Hand them to Henry, (meaning me,) & let him hand them to me." Mr. Shipman handed the notes & the money to me, & I handed them to Mr. Michaels. Mr.
88 Shipman then wrote a receipt. I am not certain whether Mr. Shipman or Mr. Michaels signed the receipt by signing the firm-name of Michaels & Levi. That receipt Mr. Michaels handed to me; don't know what was done with the other papers; don't know what became of the paper my father signed. Nothing further was done there. This interview after tea lasted about an hour. I returned to Hudson the next morning, Tuesday morning. One thing I omitted to say, & that was, that before we left Mr. Shipman's office Mr. Michaels said that Louis (meaning Louis Sloman) would come to Hudson to-morrow & see what goods you want, & make a memorandum of them & send it to Mr. Michaels. I saw Mr. Sloman the next day, Tuesday, October 26, 1869; Mr. Sloman came to our store.

Q. State what transpired there at the store that day.

(Objection generally to any conversation with Mr. Sloman when Mr. Michaels was not present.)

A. Mr. Sloman came into the store & said he had come to make out a list of what goods we needed, so as to send it to Mr. Michaels. My brother & Mr. Sloman looked through the stock, & made out a
89 list of what goods we needed. Mr. Sloman made some proposition in regard to some goods he thought we ought to have, & Mr. Sloman took the list & went away.

(Counsel for complainant reserves the right to recall & examine this

witness, after the examination of Sloman, in respect to what took place on the following Saturday.)

Q. State whether the schedules in bankruptcy filed in the proceedings against yourself & your brother state correctly the indebtedness of your firm at the time they were filed.

A. They do.

Q. Do they include the indebtedness to Michaels & Levi?

A. I believe they do not.

Q. Do they include among the assets this stock of goods?

A. Not that I remember.

Q. What was the value of these goods on the 25th day of October, 1869, as nearly as you can estimate?

A. About $5,000—a little more than that, if anything.

Q. State whether the schedules aforesaid set forth correctly the assets of your firm at the time they were filed.

A. They do.

90 Q. State whether your firm, from the 25th October, 1869, had any other assets than those named in said schedules, except the stock of goods transferred to Mr. Sloman, as you have above narrated.

A. It had not.

Cross-examined by Mr. O. M. Benedict:

I am the younger of the two brothers. At that time my brother & I resided together in the same house in Hudson. I reside now in Attica, in this State. I left Hudson on the 1st of February, 1870; have been acquainted with Louis Sloman nearly three years; knew him at Coldwater. Prior to 22nd of October, 1869, the last time I saw Mr. Michaels was in Sept., 1869, between the middle & the last of Sept., at his store. I did the buying for our firm after the first stock was bought. I was in Rochester in September, to purchase goods. I made purchases at that time to between $2,000 and $2,500. I purchased between $1,200 & $1,500 of Michaels.

Q. Did you say anything to Mr. Michaels or to any of the firm, at that time, in relation to the condition of your business?

A. I did.

Q. What statements did you make, and to whom?

A. I don't remember any statements particularly that I did make.

91 Q. Did you give them to understand that you were sound?

A. No, sir; I think not.

Q. Did you indicate to them in any way that you were unsound?

A. Not that I remember of.

Q. Did not Mr. Michaels say he wanted to know how you were doing before he sold you any more goods?

A. I think he did, but not exactly in that form.

Q. In what form was it?

A. He asked me how trade was, & how it had been for the last season. I told him that trade was very dull, & had been for all the season. I did not tell him I was good & able to pay my debts. I bought goods of other parties, on that same occasion, to between $500 & $800. At the time I made those purchases I had a stock on hand worth between $3,500 & $4,00 at cost price. I heard from Mr. Michaels after this purchase, & prior to his coming there the 25th of October. We received a telegraph from him asking for a note we were to give him; also, a letter. They were both asking for a note. I did not have the principal charge of the business. My brother & I were together. I was not aware that

Mr. Michaels was coming there in October. He came about four
92 o'clock in the afternoon. He came in the store & shook hands, & wanted to know how business was. I told him it was improving a little. Hudson has between 2,000 & 3,000 inhabitants. There are two other clothing-stores there. He said he had come there to look over matters with us & see how matters stood. He said he had been to Detroit to see some parties there & to see Louis, and he thought he would stop & see us on his way back. He asked me how many goods I thought we had on hand. I told him about $6,000. He said he thought we had not quite that. I told him I might be mistaken, but thought we had. He asked me if I had any objection to his taking an invoice of the goods. I said I had not—I mean to take an account of stock. I think then he went to tea, & we agreed to wait until morning before taking account of stock. He came back after tea, & we agreed to take the account of stock next day. So far nothing had been said about buying or selling that stock. Next morning Michaels & myself commenced taking the inventory. I called off the goods & he took it down. In that way we went through the stock, except some few articles I afterwards found which had been omitted. The inventory,
93 as Mr. Michaels said, was about $4,500. I never saw the inventory. We got through making the inventory between 10 & 11 o'clock a. m. We counted the goods. When the inventory was completed Mr. Michaels wished to look through the books. I said he might; & he did. We had outstanding debts due us that were good to about amount of $200 or $300. I never collected any of them, except enough to pay some bills, about $6 or $7. Mr. Michaels kept the books over night. The 23rd of October was the day he took the books, & kept them until Monday. I saw Mr. Michaels on Saturday, at about 3 p. m. He came to the store & said, "Henry, this is in a bad shape. You have not got as many goods as I supposed you had." Up to this time I had not given him the amount of our indebtedness. He had the books, & the accounts were all there. Our books showed our entire indebtedness. My brother kept the books. Mr. Michaels asked me if we owed any other parties than those in Rochester. I told him we did. I told him we owed Mowry & Co., of Detroit, & others. I stated the amount of our debts as they appear in the schedule. Mr. Michaels footed up the debts. They were more in amount than the stock was. In mak-
94 ing the inventory I gave him the prices of the goods. When he came in & said, "You'r' in a bad shape," &c., I asked why. He said the invoice figured about $4,400. I said he must be mistaken, but he said that was what the invoice figured. He said, "Henry, I don't want any underhanded game in this." I said there was none; that the goods were all on the shelf, & the books would show our accounts. He said he did not want to injure us or throw us out of business; he wanted to see us do well. He then said, if it should be thrown into bankruptcy, how much would be realized from the goods. I said I did not know. He said, "Your father will get about ten cents on the dollar, & so will I." He then asked me if I had any proposition to make to him. I told him I had none. He said, "I see no other way, unless I buy the stock of goods & run the store myself."

Q. Mr. Macary, do you mean to say that Mr. Michaels proposed to buy your stock of goods & allow you to control it, and continue on in business just the same as though no such transfer had been made?

A. I do. This was in the afternoon of Saturday. I said I did not know what I could do until I saw my brother & he was present. He did not propose on Saturday that I should sell to some third per-

95 son. Nothing was said on Saturday about selling to a third person, that I remember of. He did not, on Saturday, state the object, nor what benefit could be derived from my selling out. That was, substantially, all that was said on Saturday in regard to propositions. Our next interview was on the next day, Sunday, the 24th of October, at his room, in the Comstock House. The thing was talked over there different from the talk on Saturday. He made a proposition that we should sell the stock of goods to him through a third party; he did not state who, nor give any reasons at that time for introducing a third party. This was the only change in the proposition of Saturday. I told him that I did not know how that would do; that I could do nothing until I saw my brother & he was present. I was at the hotel about half an hour. I did not inquire of him on Sunday, at the Comstock House, why he wished me to sell out. I made no inquiry, that I remember, what good would come of it. He said it must be fixed in some shape to-day, or he would close the store in the morning. Mr. Michaels & I then went to our house where my brother was, & Mr. Michaels
96 stated the proposition to my brother. The proposition made to my brother was to sell to Mr. Michaels through a third party. The third party was not named then. My brother asked Mr. Michaels what we should do with our other creditors if they should present their bills. My brother did not then inquire what benefit it would be to sell out.

Q. Do you mean to say that neither you nor your brother made any inquiries of Mr. Michaels on this occasion of the advantages that would result, either to Michaels or these brothers, by a sale?

A. Not up to this time; afterwards we did. We made such an inquiry at some time; it was made by my brother. My brother asked how that was going to benefit the matter any. Michaels said, "It will keep you in business & give you a chance to pay up your creditors & secure us." My brother asked Michaels what we should do with the other creditors, when they presented their bills. He said "Pay no attention to them; they can't do anything." My brother said it would throw the other creditors out in the cold. That was all my brother said that I remember. I said nothing. Don't remember that the other creditors were named at this time. I had told Mr. Michaels, on Friday & Saturday, the names of all the creditors, & on one occasion the amounts
97 due them, or near it. This was before I went up to see my brother. I did not tell him that Mowry & Co. had a mortgage on this stock. My brother told him, in my presence, on Monday morning; he told him the amount. Don't know whether Michaels took a list of the creditors.

Q. Before you went to Coldwater on Monday, had it been arranged that the stock should be sold to Mr. Michaels?

A. Yes, sir.

Q. Had the price been agreed upon?

A. No, sir, nor the mode of payment. The terms & conditions of the sale had been agreed upon. We were to sell the stock of goods to Mr. Michaels, & he was to restock the store with new goods, such as we needed; that we were to conduct the business the same as we had done, paying the expenses of the store, having our living out of the profits of the goods, & remitting the balance to Mr. Michaels. This was to continue until we got Mr. Michaels paid up. On this arrangement, we went up to Coldwater. My brother assented to this. There had been something said about father's bill.

Q. Was it not a part of Mr. Michaels' proposition, for the sale of the goods, that you should be released from your father's debt?

98 A. It was not, exactly.

Q. Did his proposition embrace any arrangement in respect to your father's debt?

A. Yes.

Q. Was not it to be discharged so far as this stock of goods was concerned?

A. No, sir.

Q. Was it a part of Mr. Michaels' proposition that your father should assent to the sale?

A. Yes.

Q. Was it not to obtain this consent that an interview was sought on Monday?

A. Yes.

Q. Did you telegraph to him to meet you at Coldwater?

A. I telegraphed him to be at home, as I wished to see him.

Q. Did Michaels & you go to Coldwater on Monday?

A. Yes.

Q. What did you go to Coldwater for—Mr. Michaels & you?

A. To see my father, so that Mr. Michaels could talk with him & explain the matter to him, so that he would not make us any trouble in regard to his claim.

Adjourned, by consent, to December 14, 1870, at 9.30 a. m., at same place.

December 13, 1870.

J. D. HUSBANDS, *U. S. Com'r.*

DECEMBER 14TH, 1870.

Parties appear as on 12th December, 1870.

99 Cross-examination continued by Mr. Benedict:

Q. Are you aware that your father has been examined in this case at Detroit?

A. Yes, sir.

Q. Have you seen his testimony on that occasion?

A. I have seen the papers—I have not read his examination.

Q. Have you heard it read?

A. Yes, sir; I have heard it read only once. It was read to me last Monday. I do not recollect what he testified to in respect to the interview at Shipman's office on Monday, October 25th, 1869. I have no recollection of what he testified to about it.

Q. Have you any recollection of what he testified in regard to anything that transpired at Shipman's office on that occasion?

A. Not that I remember of now.

Q. What was the object of seeking an interview with your father on 25th October, 1869?

A. So that Mr. Michaels could explain this matter to him, so that he (father) would not make us any trouble as to his claim.

Q. Had you any fear that your father would make you trouble?

A. Not unless other parties should make us trouble. I went on that occasion to Mr. Shipman's office with my father. I found at the
100 office, when I arrived, MR. Michaels & Mr. Shipman, & nobody else that I knew, that I now remember of. I am certain Mr. Louis Sloman was not there. I had not seen Louis Sloman that day. He did not come to Shipman's office till after tea & the papers had been prepared by Mr. Shipman. I did not on that day see Louis Sloman till after tea. I mean to say, the bill of sale had been drawn to Mr. Sloman before his

appearance there & before anything had been said to him in respect to making the purchase, so far as I knew. Mr. Michaels first suggested that father sign some paper, & he (Michaels) suggested what it should be. The papers were drawn under Michaels' direction. Several bills of sale were drawn & torn up, & not any paper for my father to sign. Mr. Michaels opened the subject to my father. Mr. Michaels, my father, & myself were present, & no one else, at that time. Mr. Michaels told my father that he had sent for him to talk with him about a matter in regard to our firm & their own, & to explain it to him, (my father.) He did not say in the beginning of the interview, a sale had been agreed upon provided he assented to it. I think he did not say that, during the interview, in that form. He said that substantially, as I understand it.

101 He stated it in this way; he had made a proposition to the boys, & had come there to explain it to him, (father,) so that it would be satisfactory to him.

Q. Did he say you had agreed to sell to him, (Michaels,) provided he (your father) assented to it?

A. Yes, sir; on the conditions I have before named.

Q. You had not agreed to sell to Michaels with your father's consent, even, had you?

A. Yes, sir.

Q. Was not the transfer to be made to Sloman?

A. No, sir. After hearing Mr. Michaels in my presence, my father did assent to the sale. That assent, I think, was put in writing by Mr. Shipman, & father signed it. I think the bill of sale & that assent were not drawn before we went to tea. I am quite certain on that subject. No papers, that I now remember of, had been drawn before tea, except those which were torn up. I went home to tea with father. I think I talked the matter over with father while we were gone to tea. I found at Mr. Shipman's office, on our return from tea, only Mr. Michaels & Mr. Shipman. I think Mr. Shipman went right on drawing the papers on our return from tea. None were torn up, that I recollect of, after

102 tea; I think what were drawn after tea were executed. I do not now remember who signed a paper first on that occasion, my father or myself; I think the bill of sale was to Louis Sloman.

Q. How came it to be to Louis Sloman?

A. Mr. Michaels had it made out in that way; there had been no agreement of the kind. Nothing had been said to father about its being made to Sloman, that I remember of. I think nothing was said to father about making the bill of sale to Sloman. Father did not ask why that bill of sale was made to Mr. Sloman, that I remember. I think father did not sign any paper assenting to the sale of our stock to anybody. I don't remember that Mr. Sloman's name was mentioned in the paper father signed. It is my best recollection *is* that Sloman's name is not mentioned in the paper father signed.

Q. What was the substance of the paper your father did sign?

A. That he would not make us any trouble till such a time as Mr. Michaels should get his pay. I think that was all of it. I can't say to whom it was delivered. It lay on the table, the last I saw of it.

Q. You executed the bill of sale to Mr. Sloman, did you not?

103 A. No, sir; Mr. Shipman drew it up.

Q. State the substance of that bill of sale, as near as you can.

A. I think the bill of sale of our stock ran to Louis Sloman. The substance was, a bill of sale of the stock to him; its contents I do not recollect.

Q. Do you recollect whether it stated the terms of payment?

A. I am not certain whether it did or not. I think the amount he was to give for the stock was stated in the bill of sale.

Q. Do you remember whether Mr. Sloman was present when you signed the bill of sale?

A. I think he was. I think he was also present when father signed the paper he did sign.

Q. On that occasion did you receive from Mr. Sloman money & notes to the amount stated in the bill of sale?

A. I received money & notes from Mr. Shipman.

Q. Question repeated & reread.

A. Mr. Sloman handed to Mr. Shipman (J. D. H.) money & notes to the amount stated in the bill of sale, & Mr. Shipman handed them to me. One-quarter of the amount was in money. There were three notes, at six, nine, & twelve months.

Q. On that being done, was the bill of sale handed to Mr. Sloman?

A. I don't remember.

Q. What did you do with the notes & money?

104 A. I handed them to Mr. Michaels. He gave me for them a receipt in full of the claim of Michaels & Levi against my firm. My father was present during this entire interview. My father took proceedings in bankruptcy against my brother Harlow & me, subsequent to that time. Sawyer & Beane were the attorneys who conducted these proceedings for father. They live at Hudson. When these proceedings were commenced my brother & I resided at Hudson, & my father at Coldwater, Michigan. My brother & I did not accompany my father to these lawyers in respect to those bankruptcy proceedings, before they were commenced.

Q. Did you go with him to see these lawyers in respect to the difficulty growing out of the sale to Sloman?

A. We did; my brother & myself. Nothing was said by any of us, before going to see these lawyers, about my father's putting us into bankruptcy. My brother made the statement to the counsel in answer to questions. I think my father, & not my brother, opened the conversation with the counsel. I do not remember what father first said to the counsel.

Q. Was it not, substantially, that the boys, or my sons here, have got into a difficulty by a sale of their stock?

105 A. I think it was. I think my brother then went on with a history of the case. Counsel then made inquiries of my father, brother, & myself in respect to it. I did not hear the counsel advise what to do. My father, & Mr. Sawyer, & Mr. Howell, another lawyer, went in another room together after the statement was made. After this interview with the counsel, father went home & took dinner with my brother & self. I think he did not tell me they advised the bankrupt proceedings. I think he said they would look the matter over further & advise him what to do afterwards.

Q. Did you learn at any time before the proceeding was commenced that they advised proceedings in bankruptcy?

A. Nothing more than a hint given by Mr. Sawyer to my brother in my presence. My father said nothing to us about it that I remember of. I heard nothing more till the papers were served.

Q. Who provided your father or Mr. Sawyer a list of creditors for those proceedings?

A. I do not know. Mr. Sawyer had our books. I did not furnish a list, nor did my brother that I know of. My brother handed Mr. Sawyer our books at Sawyer's request, made to him

106 in my presence. I think on the day of the interview

I have mentioned, & before the interview, Mr. Sawyer & my brother came from the depot together, & Mr. Sawyer came in the store & asked my brother to bring the books to his office. My father came from the depot with them. Sawyer did not say what he wanted of the books. I did not understand from my father that that interview at Sawyer's had been arranged for that day. Nothing that I know of had been said to Sawyer about this interview prior to its taking place by my brother or self. I had not consulted Sawyer about the difficulty growing out of the sale to Sloman, & my brother had not so far as I know. This interview at Sawyer's was on Saturday, October 30th, 1869, the day a difficulty occurred with Sloman in respect to the possession of the stock. My father went to Sawyer's office that day to see what he could do with respect to his claim on the stock of goods. Our firm did not telegraph or write father to come there that day. He had been to Adrian, & my brother went to depot to meet him. He had intended to stop off one train as I understood. Sloman was at Hudson at the time.

107 Q. Who suggested going to Sawyer's office?

A. I don't know. Mr Sawyer had done some business for my brother & self as counsel for us.

Recess one hour.

The papers in bankruptcy were served on us in November, & I think about 3 weeks after this 30th October, 1869; might have been a little longer. I had seen my father once in the mean time, at Hudson. I think father was at Hudson the next week after 30th October, 1869. He took supper there. I did not go to Sawyer's office with him on that occasion. My brother did not, to my knowledge. I think father did. I don't recollect that the difficulty with Sloman was then a subject of conversation. On reflection I think it was at the supper-table. I do not remember what my father said about it. I think I remember something he said at that time. He said it was not right, it was not as he understood it to be.

Q. What was it he said was not right as he understood it to be?

A. Mr. Sloman's taking the goods as he did. I do not know whether this was after father had been to see Mr. Sawyer on that day; I do not remember. I do not know whether he went to see Mr. Sawyer

108 before or after supper. He staid at our house that night. He did not, that I remember of, tell me or my brother on that occasion that Mr. Sawyer advised him to take proceedings in bankruptcy. I do not remember that my father said anything about proceedings in bankruptcy that day. He said he was going to Detroit to see about the case; did not say what for, that I remember. He did not say what he was going to Detroit for. Father did not ask me if we were taking any legal proceedings to hold the stock. He did not ask us anything about it. He said he came there to see Mr. Sawyer & Beane; that is all he said on that subject.

Q. State what he said when he said that, & what else he said.

A. He said he had come there to see Messrs. Sawyer & Beane with regard to our trouble, & to see what he could do in respect to his claim. He said our trouble with Sloman & Michaels. I think father went to Detroit the next day. He did not say anything about taking any papers to Detroit, that I remember of. I did not see my father again, or hear from him by letter, till after the bankruptcy papers were served.

109 Everything was friendly between myself & brother & father, & always has been. Prior to this sale to Sloman we had not sold

out our stock to another firm. We did not make an agreement to sell to Riddle & Rowe, of Hudson. We had no negotiations with them for the sale of anything. We did not buy any horse & buggy of them. I knew Mr. Riddle, of that firm. Neither my brother, or self, or our firm, negotiated to buy a house & lot of Mr. Riddle. Prior to Mr. Michaels' coming to Hudson in October, 1869, Mr. Levi had been there. Mr. Levi came there in June or July, 1869, I think. We did not about that time negotiate to sell out

Q. Did your father ever claim that you were dishonest with him?

A. No, sir; he never claimed I had ever done anything to defraud him. The deputy United States marshal served the papers on me; I think his name was Smith. We did not oppose the proceedings at all; we were declared bankrupts by default, as I understand it. We have done nothing in the bankruptcy proceedings, so far as I know. We let the old gentleman have his own way. I have never seen the bill of sale to
110 Sloman, or the paper signed by my father, since the evening they were drawn, October 25th, 1869. Mr. Sloman replevied & kept the goods; we made no defense to that suit.

On this 16th day of December, 1870, the said witness is further examined as a continuation of his direct examination.

Direct examination by Mr. Post:

Q. In your cross-examination on page 25, in detailing the interview at your house on Sunday, you state that "the proposition made to my brother was to sell to Mr. Michaels, through a third party; the third party was not named then." State what you mean by that.

(Objected to by defendants' counsel as incompetent to ask this witness what he means.)

A. I mean that the third party was not mentioned at that point of the conversation. Such person was named during that conversation afterwards.

Q. You state in your cross-examination at page 32——

(Defendants' counsel objected to the complainant's counsel stating to his own witness what he had stated. Question abandoned.)

Q. You were asked on cross-examination: "You executed the bill of sale to Mr. Sloman, did you not?" In making your answer to
111 that question, what did you then understand to be the meaning of the word "executed?"

A. The drawing up of the bill of sale. I have heard read the examination of my father. Mr. Post read it to me last Monday, here at Rochester, at the hotel. I arrived here very near 11 o'clock a. m., last Monday, December 12th, 1870. That interview lasted nearly two hours.

(This last objected to as inadmissible.)

Last saw my father and brother in April last, at Coldwater, Michigan; I then moved to Attica.

Q. On page 29 of your cross-examination you state——

(Objected to as before.)

in speaking of your father's examination, as follows: "I do not recollect what he testified to in respect to the interview at Shipman's office, on Monday, October 25th, 1869;" what did you mean by that?

(Objected to as before.)

A. I meant I did not remember his exact words; I then recollected the substance of what he testified to.

Cross-examination renewed by Mr. Benedict:

Q. What was the object of reading your father's testimony?

112 A. To see if I remembered the transaction the same as he did.

Q. Was it not to have your testimony accord with your father's?

A. I could not say as to that; I believe it was read to refresh my recollection.

Q. But for the reading of that testimony could you have stated the interview which occurred at Shipman's office as fully as you have stated it here?

A. I could, sir.

(Signed) H. S. MACARY.

ROCHESTER, *December 16th*, 1870.

This witness, Henry S. Macary, is recalled to give testimony by way of rebutting testimony.

Direct examination by Mr. Post:

Q. You have sat here & heard the entire testimony of Louis Sloman & Henry Michaels, have you not? &, if not, you have heard it all read.

A. I have heard it all as it was given.

Q. State whether such testimony has changed your recollection of the transactions as you have already testified to them, or in respect to any or either of them, or any part thereof.

A. It has not.

Q. State whether at any time during the interviews between you & Henry Michaels on Friday, Saturday, Sunday, & Monday, October 22nd to 25th, 1869, both inclusive, he said anything about having received a draft from Louis Sloman; &, if so, what did he say on that subject?

113 A. Mr. Michaels *says* to me, either on the Friday or Saturday, "Louis is doing first-rate. He sent me some money; sent me a draft the week before." I think he said for $1,000, but I am not sure of the amount he stated. He also said to me, at the same interview, "Here is a draft for $500 that Louis gave me before I left Coldwater," & showed me the draft. I did not read it, but he took it out of his pocket & had it in his hand. He said Louis, meaning Louis Sloman.

Q. Did you at any time during the progress of the examination here state to Mr. Post this fact in respect to the draft?

A. I did; yesterday, in the forenoon, while Mr. Sloman was testifying, and prior to the recess yesterday.

Louis Sloman was not at Coldwater, so far as I know, more than once between 25th & 30th October, 1869. I heard his testimony as to hiring Harlow & myself to work for him. There was no such transaction or agreement; there was no agreement at all to hire.

Cross-examined by Mr. Benedict:

He, Michaels, took out the draft out of his pocket & showed
114 it to me, either Friday or Saturday. He showed me no other paper.

(Signed) H. S. MACARY.

Taken & sworn December 12th, 13th, 14th, & 16th, & subscribed December 16th, 1870, before me.

[SEAL.] (Signed) J. D. HUSBANDS,
U. S. Commissioner & Special Examiner.

NORTHERN DISTRICT OF NEW YORK, *ss:*

It is agreed that a stipulation of this date, made by the solicitors or attorneys, be attached to the depositions taken before me; and I do cer-

tify & report that the testimony & depositions of the said witness was carefully read to him & was signed by him in my presence. I do further certify that I am not of counsel nor attorney for either party to the said suit above entitled, at the commencement of such deposition.

Witness my hand & official seal at Rochester, in the county of Monroe, & State & northern district of New York, this 16th day of December, 1870.

[SEAL.] (Signed) JOS. D. HUSBANDS,
U. S. Commissioner & Special Examiner.

The circuit court of the United States for the northern district of New York.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Harlow E. Macary and Henry S. Macary, bankrupts,
vs.
HENRY MICHAELS AND NATHAN LEVI.
} In equity.

115 It is hereby stipulated & agreed by and between the parties to the above-entitled cause, by their respective solicitors, that the depositions of Adam T. Macary, Harlow E. Macary, & Mary E. Macary, taken by consent of parties, by and before F. H. Canfield as special examiner in said cause, at Detroit, Michigan, & also the deposition of Henry S. Macary, Louis Sloman, & Henry Michaels, taken by consent of parties, by & before Joseph D. Husbands at Rochester, New York, may be read in evidence by either party, on the hearing of said cause, as proofs therein, subject only to objections substantially for incompetency & irrelevancy, and that the files & proceedings, or certified copies thereof, including the testimony of the defendant, Michaels, taken upon an examination had on the 16th & 17th days of June, A. D. 1870, before Hon. Hovey K. Clarke, as register in bankruptcy in the proceeding pending in the district court of the United States for the eastern district of Michigan, in bankruptcy, entitled in the matter of Harlow E. Macary & Henry S. Macary, together with a certified copy of the assignment made & executed by said register in bankruptcy in said cause to the complainant above named, may be produced & read
116 in evidence, on the hearing of said cause, as proofs therein, by either party, as if duly proved, subject only to objection for incompetency & irrelevancy; & also that the endorsement of fil'ing upon the several papers contained in said files & filed in said cause may be received as proof of the date of filing the same.

Dated at Rochester, December 16, 1870.

(Signed) A. M. BENEDICT,
Def'ts' Attorneys.

(Signed) F. A. MACOMBER,
Att'y for Compl't.

Attached by me, by agreement of the counsel for both parties, Rochester, N. Y., December 16, 1870. See page 45.

(Signed) JOS. D. HUSBANDS,
U. S. Commissioner.

117

118 *Defendants' proofs before Joseph D. Husbands, U. S. commissioner and special examiner, Dec'r 14, 15, 16, 1870.*

In the circuit court of the United States for the northern district of New York. In equity.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Harlow E. Macary & Henry S. Macary, complainant,
vs.
HENRY MICHAELS AND NATHAN LEVI, defendants.

UNITED STATES OF AMERICA,
State of New York, Monroe County, City of Rochester, ss:

Be it remembered, that, on the 14th, 15th, & 16th days of December, 1870, before me, Joseph D. Husbands, a commissioner appointed by the circuit court of the United States of America for the northern district of New York, in the second circuit, at the said city of Rochester, personally appeared the said complainant, Hoyt Post, and the said defendants appeared, by Mr. O. M. Benedict, their solicitor & counsel, & the following-named witnesses, Louis Sloman and the said Henry Michaels, are duly examined, on oath, in the above-entitled suit, as follows:

NORTHERN DISTRICT OF NEW YORK,
Monroe County, City of Rochester, ss:

DECEMBER 14TH, 1870.

119 LOUIS SLOMAN, being of the age of twenty-three years, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the said suit pending as aforesaid, thereupon doth depose & testify as follows, that is to say:

Direct examination by Mr. Benedict:

I reside in Coldwater, Michigan. I have resided there near five years. I know Harlow E. & Henry S. Macary, composing the firm of Macary Bro's. I have know' them most all the time I have been in Coldwater. I was in their store in 1869. The first time was, I think, the latter part of August, 1869, or perhaps early in September. I was there again in October, 1869, either the 26th or 27th, I am not positive which. I was at Mr. Shipman's office in Coldwater, where a negotiation was had with Macary Brothers for their stock; Mr. Shipman, Mr. Henry E. Macary, his father, Mr. Michaels, & myself were present. I went there about half-past four o'clock in the afternoon, I think. I went with Mr. Michaels. Messrs. Macary, father & son, met us at the corner of the street, & all went in Mr. Shipman's office together. I think we found Mr. Shipman in the office. I told Mr. Shipman I had bought out Macary Brothers, & had come to have him make out the papers;
120 that is the first after going in the office. I stated the terms, as I understood them, in the presence of Henry S. Macary & his father.
J. D. H. I stated the terms to be, that Mr. Michaels was to arrange with their eastern creditors, & I was to pay seventy-five cents on the dollar, & Macary had agreed to get his father to give up his claim. I stated that was one of the conditions. I told Mr. Shipman I was to give my notes—four notes, I think it was—three, six, nine, and twelve months. I quit talking at that time. Mr. Shipman looked up at those other parties, at that time, & asked if that was so. Both assented. I did not hear any

conversation there between Mr. Michaels & the elder Macary, Henry's father. I think the old gentleman said it was hard, but he must give up his claim against his sons. Nothing was said about a mortgage on the stock, at that time. The giving up of his claim by the old gentleman was made a condition of the purchase. I heard Henry Macary say he owed his father $2,200, Michaels & Levi, $4,600, eastern or Rochester creditors, $1,200. He didn't say anything about Mowry & Co., of Detroit. This interview at Shipman's office was all before tea. Mr. Shipman left the room during the interview. He was out probably not to exceed ten minutes, & perhaps not over five minutes. On his re-
121 turn he drew up some papers. The papers were drawn before tea—a bill of sale, & a paper for old Mr. Macary to sign. I don't recollect any other papers at that time. The papers were signed before tea. I did not return to Mr. Shipman's office that evening after tea. I think I staid at his office that evening till half-past six o'clock.

Q. Witness is shown a paper and asked, Is that the bill of sale signed by Henry S. Macary on that occasion?

A. Yes, sir. This is the paper delivered to me on that occasion.

(Put in evidence, and marked defendants' "Exhibit A.")

Exhibit A. There was a paper delivered with this, purporting to be an inventory of the stock. I finally concluded to pay one-quarter the money, & to give my three notes, one at six, one at nine, and one at twelve months, for the stock. I did, on that occasion, give cash & my notes in that way. I delivered these notes & paid the money to Henry Macary in the presence of Mr. Shipman & the old gentleman, Mr. Macary, & Mr. Michaels. The old gentleman signed a paper drawn for him. That paper was delivered to me by Henry Macary, when I handed him the
122 money & notes. The same persons were present. This is the paper signed by the old gentleman, Mr. Macary.

Exhibit B. (This paper is put in evidence, and marked defendants' "Exhibit B.")

This paper was delivered to me on that occasion by Henry S. Macary. I see the erasure across "&," and also across "then," last line of this paper, before words "to this date." These were there when I received this paper. It is now as it was when I received it, in all respects.

Q. Did you hear any conversation at Shipman's office in respect to the continued possession of the stock of goods by the Macary Brothers?

(Question waived.)

Q. Did you hear anything said there about the Macary Bro's remaining in business there & continuing in possession of the stock the same as they had been doing?

A. No, sir. I did not make any arrangement with the Macary Brothers for them to continue in possession of the stock & of the business. After the delivery of these papers the parties separated.

J. D. H. Q. Starting from that point, go on & state carefully all that occurred between you & the Macarys in relation to that stock of goods.

A. On the 26th or 27th October, 1869, I went to Hudson, the interview at Mr. Shipman's office having been on the 25th October,
123 1869, & went to the store; looked over the stock; took a memorandum of what fresh stock was wanted. I went out & purchased some account-books for the store; took the sign down by the assistance of one of the Macarys. I am a little ahead of my time. I found Mr. Henry Macary in the store, in the first place. He said Harlow would be down in an hour or so. I think I asked them what they would want a week to continue right along in my employ. They said they did not know; one or the other said so in the presence of his brother. One of

them asked me what I thought it was worth. I replied, they were married men, knew what it cost them to live; they ought to know better than I. If I recollect right, they conferred a moment together. One of them asked me, would $11 a week be too much. I said no; & was willing to pay it; I mean, $11 each a week. I cannot now give the events in their order. I can tell what transpired. The sign was taken down & taken to the tin-shop. I wish to make a correction. I went down to see a sign-painter & got him to take it down. I had my name painted on the sign in place of the Macarys. After that was done
124 the sign was put up on the store over the front door. I told the Macary Brothers, whenever there was $100 taken in to send it to me. I showed them the way I wanted the books kept. On the night before I left Coldwater, a Mr. Sibbetts came to me & said he heard a report that I had bought out the Macarys Brothers. I said I did. He said he heard there was a chattel mortgage on the stock, two or three weeks previous, to Mowry & Co. I learned there was a mortgage on the stock of $400 to Mowry & Co., of Detroit.

Q. Had you ever heard of that debt, or of that mortgage, prior to your purchase?

A. I had not. (Witness is shown four promissory notes, & says:) I received these four notes of Mowry & Co. I also received this assignment from them by mail, on sending them a note satisfactory to them
Exhibit C. for it. These four notes are attached to the assignment, & all are marked defendants' "Exhibit C."

I think my endorsed note I sent them was $358 & some cents. It is correctly stated in the assignment of the notes at $358.88. I called the attention of the Macary Brothers to the fact of the existence of this mortgage the second time I went down to Hudson. Harlow was
125 the only one present. He said he did not know of any. I replied it was strange such a mortgage could exist & he not know it. He said Henry knew about it. His brother Henry came in. I asked him, How about that chattel-mortgage on this stock? He denied it at first, but finally admitted it. I asked them what they were going to do about it. I told them I should allow no chattel-mortgage on my stock. They said they had nothing to make it right. I asked them if they had some book accounts. They said they had. They assigned them to me to help meet this mortgage. This is the assignment given for that pur-
Exhibit D. pose, marked "Exhibit D." I wrote it.

Adjourned, by consent, to December 15th, 1870, at 10 a. m., at same place.

December 14th, 1870.

(Signed) J. D. HUSBANDS,
U. S. Commissioner.

ROCHESTER, *December* 15, 1870.

Parties appear as on 14th December. Direct examination continued by Mr. Benedict.

These accounts assigned to me. They could not tell me the amounts, but would let me know by mail. On the morning I went down the second time, I think the 27th, I came to Hudson very early in the morning. Not finding the Macarys in the store, I went in the store of Riddle & Lowe. After going to their
126 store, I called on the Macarys, & the interview I have stated then took place. I went home that day. I went to Mr. Shipman, told him the facts, & asked his advice on the night of the same day, I think. I went back to Hudson Saturday morning, took my clerk with me &

conversation there between Mr. Michaels & the elder Macary, Henry's father. I think the old gentleman said it was hard, but he must give up his claim against his sons. Nothing was said about a mortgage on the stock, at that time. The giving up of his claim by the old gentleman was made a condition of the purchase. I heard Henry Macary say he owed his father $2,200, Michaels & Levi, $4,600, eastern or Rochester creditors, $1,200. He didn't say anything about Mowry & Co., of Detroit. This interview at Shipman's office was all before tea. Mr. Shipman left the room during the interview. He was out probably not to exceed ten minutes, & perhaps not over five minutes. On his re-
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Exhibit D.

Adjourned, by consent, to December 15th, 1870, at 10 a. m., at same place.

December 14th, 1870.

(Signed) J. D. HUSBANDS,
U. S. Commissioner.

ROCHESTER, *December* 15, 1870.

Parties appear as on 14th December. Direct examination continued by Mr. Benedict.

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126 store, I called on the Macarys, & the interview I have stated then took place. I went home that day. I went to Mr. Shipman, told him the facts, & asked his advice on the night of the same day, I think. I went back to Hudson Saturday morning, took my clerk with me &

looked over the books & saw what had been done during the week, & asked them for the money they had taken, & finally told them they had deceived me. I think both were present at the time. I think I told them they had deceived me in respect to the chattel-mortgage; I know I did tell them so. I also told them we would pack up these goods & ship them to Coldwater. They said they would not do it. I told them they were in my employ till Saturday night, & ordered them again to do it. They refused, & Harlow stepped out of the store. He came back in a few minutes with a man, & Harlow told that man to attach that stock for $6,000. That man was one of the firm of Sawyer & Beane, lawyers, of Hudson. He told them not to be so fast, & Harlow & he went out together. I think this last time they went out Harlow snatched up all the books & carried them off with him. He came back probably in ten or fifteen minutes afterwards, his father with him. A. T. Macary
127 & Harlow took in the goods hanging outside & told us all to get out. We went out, & he locked the door. On the Monday or Tuesday following I replevied the stock & retained it; I put it with my own stock & sold it.

Q. Now, go back to the 25th day of October, 1869, the day of the interview at Shipman's office. State whether or not you had an interview with the Macarys, or either of them, prior to going to Shipman's office.

A. I did with Henry S. Macary, coming up from the train on that day. It was the train on which he arrived at Coldwater; Mr. Michaels was with him. Mr. Michaels said, in Henry's presence, as we walked along together, "The Macarys want to sell out; will you buy?" I said I would if I could buy it at a fair price. Michaels said they wanted to sell out their stock. I asked the reason they wanted to sell; I asked that of Henry S. Macary. He said they were $3,000 or $4,000 behind & would be thrown in bankruptcy if they did not. I asked him what they would take for the stock. He said it ought to be worth 90 cents on the dollar. I told him I would not buy at that price. Mr. Michaels said he thought seventy-five cents a fair price.

Q. Was anything said as to the amount of stock; &, if so, what?
128 A. There was, I think it was Mr. Macary who said it; he said the amount of stock was about $4,600. I said I would not give over 75 cents for the best old stock that ever was. Henry S. Macary finally said, "We will let you have it for that amount." I asked him, How about the creditors? I made a general inquiry to both as to creditors. Mr. Macary said, he would get a receipt in full of his father's claim. Mr. Michaels said he would arrange with the Eastern creditors. Then the terms of payment were talked of right there on the street. I think I told them I could pay by giving my notes at 3, 6, 9, & 12 months. I believe H. S. Macary said that would do. I told him to meet me at Shipman's office. Mr. Michaels & myself stepped into my store. Henry said he would go up & get his father, & meet me at Shipman's office.

Q. Have you stated all you now remember of the interview between yourself & Henry S. Macary on the 25th October, 1869, prior to the interview at Shipman's office?

A. I think not.

Q. State what further you remember.

A. I asked him in regard to the stock; how it was, whether he knew how it ran, as being or not being an average stock. He said it was an average stock. I have now stated all that I recollect that oc-
129 curred in that interview walking, from the train. I think we met at Shipman's office about half an hour after Henry started to go for his father. I paid my notes, given for this stock of goods, as they ma-

tured. This paper shown me was handed me at Shipman's office by the same person who handed me the bill of sale; I think, Henry S. Macary. The signature is conceded to be the handwriting of Harlow E. Macary.

Exhib E. (Put in evidence & marked defendants' "Exhibit E.")

Cross-examined by Mr. Post:

Mr. Michaels married my sister. He and I are good friends. He was at my place Coldwater the week previous to October 25th, 1869; I am not certain it was the latter part of the week. I can't state whether he left in the day or in the night, nor whether it was in the forenoon or in the afternoon when he left. I did not expect him to return to Coldwater again. I did not see him again till this 25th October, 1869. I first saw him on 25th October, at the railroad depot at Coldwater. I received a dispatch stating he was coming; I can't tell from whom; it was from Hudson, I think; I received it between one & two o'clock p. m. that day. I have not that dispatch now.

130 Q. Was that dispatch from either of the Macarys?

A. I cannot say.

Q. State as near as you can the contents of that dispatch.

A. It was either meet me, or us, at the first train. I cannot recollect whose name was signed to it. I have no impression whose name was signed to the dispatch; I have given it no thought. When I met Michaels at the depot Henry S. Macary was with him, & no one else. We proceeded directly from the depot into the city. Mr. Macary & Mr. Michaels accompanied me, & we walked. Nobody else was with me besides those two. We walked directly up Monroe s't till we came to Chicago s't; we separated there. It may have been Pearl, & not Chicago s't. We did not stop on the way, or on the corner, on arriving at Chicago or Pearl street, whichever it was. It was at one of those corners where Henry left me to go for his father, & Michaels & I went to my store. I think it a third of a mile from the depot to Chicago s't. Pearl street is one block nearer the depot than Chicago s't. I think we were 15 or 20 minutes walking from the depot to the corner where we separated. Before the separation at that corner I did not have any conversation with Michaels—not in the presence of H. S. Macary—

131 since the arrival of that train that day. I had no other conversation with H. S. Macary than I have delineated, before that separation at the corner, nor with Mr. Michaels. The dispatch did not state the nature of the business, nor the object of coming. I received no other notice or communication of their coming, or its object in any way, or of any kind, than this dispatch. The train arrived at that time at the depot from three to four o'clock p. m.

Q. State what you did from the separation at the corner of the two streets till you again met Henry S. Macary at Shipman's, & all you did during that time.

A. Michaels & I went to my store. I went back to my desk, put my book of blank-notes in my pocket, & commenced to figure up how much money I had in the bank. I was interrupted by a customer while doing so; I don't recollect who it was. I got through with him & went back to the desk, & found I had enough in bank to make the first payment, besides cash I had on hand out of the bank. I think I drew up a check, & went to the bank to get some more money, and got it & came back to the store. Mr. Michaels said to me, "There goes

132 Mr. Macary & some man with him—I guess, his father. Come along." We went together to Shipman's office. I left Michaels

in the store when I went to the bank, & found him at same place on my return from the bank. I did not talk with Michaels about this trade at all, from the time Henry S. Macary left us at the corner before getting to Shipman's office.

Q. Please state how you arrived at the amount of the first payment when figuring at the store.

A. I set down & figured how much it was at 75 cents on the dollar, & divided that by four. I took $4,600 as the amount on which to ascertain the 75 per cent. I took that amount from the statement made by Macary in the conversation. I do not recollect that Michaels showed me any paper; he might have done so. The check was drawn on Rose, Bowen & Rose, bankers, at Coldwater. It was dated that day, I think. I can't recollect the amount.

Recess of one hour.

Witness states he desires to explain some part of his testimony.

I recollect I had on hand a draft in the house of $500, I think, or somewhere near there, & some money in the house. I went to
133 the bank with the check, & could not get in. That is the way I made the payment that afternoon, & not by means of any money I drew from the bank.

EXAMINER. Do you desire to make any further explanation?

WITNESS. On that?

EXAMINER. On anything.

WITNESS. I can't say now that I do; I don't know that I do.

Cross-examination continued by Mr. Post:

I was acquainted with Adam S. Macary before this 25th October, 1869. I had not had any communication with him as to this stock prior to seeing him in Shipman's office that afternoon. I paid the check I drew, & the draft I refer to, & money enough with it to make the first payment, regarded as cash. I think the amount of that draft was $500; I can't give its date. I had had that draft in the house 3 or 4 days. My impression is, its date was within a week of 25th October, 1869. It was drawn by Rose, Bowen & Rose, the said bankers, on a New York bank; I do not recollect on what bank. I think it was payable to my order; I am not positive. I had procured it myself to send East, &, I think, within the then past week. I got it on the day of its date, whatever that was. I do not recollect whether or not I endorsed that draft, &, if I endorsed it, whether it was so en-
134 dorsed in Shipman's office or not. I do not recollect whether I endorsed it before I saw Michaels that day. If I endorsed it, it was a mere endorsement of my name, so far as I can recollect. I had no particular party in view to send the draft to when I got it. I was owing Michaels when I got that draft, I think, as much as the amount of the draft. Rose, Bowen & Rose were my bankers. I am not certain that the bankers then were Rose, Bowen & Rose, but my bankers were then the same bank as that of that firm. The check was my own check on that bank, & was for $160 or $170, dated that day. I drew it that afternoon at my store while Henry S. Macary had gone for his father, before going to Shipman's office. I think the check was payable to Macary Brothers or bearer. I don't know whether that check was endorsed at all or not. I think the cash was about $200, or perhaps a little more; might not have been any more.

Q. How came you to draw the check for that amount?

A. I think I was lacking that amount to make the payment. That

is the only reason I can give for it. I could not say whether or not I had in bank enough to make the first payment.

135 Q. Can you state the reason why you had not used this draft for the purpose for which you obtained it?

A. I think I can. I wanted to look over my books to see where it would be best for me to pay it to get a discount on the debt on which I might pay it.

Q. Why did you not do that before you got the draft?

A. I was thinking of a debt I had paid previous to that time & there was some mistake about that, and I was waiting to see about that. I don't recollect what house that was. I don't think it was Michaels & Levi. I am inclined to think Mr. Shipman counted this money at his office to see if it was right; I think no one else did. I might have done so before he did. I think I said, Mr. Shipman, count that, & handed him the money & check & draft to count. I am not positive, but I think Shipman said it was all right, or it may have lacked a few cents or a small amount. After Shipman counted the money, I think he handed it back to me. He did not hand it or offer to hand it to Mr. Michaels. I handed it to H. S. Macary, & he handed me the papers—the bill of sale, the paper signed by his father, & the paper signed

136 by his brother, Harlow. I think the invoice was attached to the bill of sale. I am pretty sure it was, for I took it off and put it in my pocket then & there. I am not positive how it was attached. I think it was pinned on. It was so attached there in that office while the Macarys, Mr. Michaels, & Mr. Shipman were present. It was so attached by Mr. Shipman. I don't recollect where I first saw that invoice. I think the time I first *I* saw it was in that office during that interview. I don't recollect whose possession it was in when I first saw it. I don't recollect from whom Mr. Shipman obtained it. I am not positive whether I ever had it in my hands before it was handed to me at the close of the interview at Shipman's office. I did not look it over at that office, as I recollect; I might have done so. I don't recollect whether I examined it any or not. I don't know whose handwriting that invoice was written in; it was written in ink, I think. I have that invoice, I think, here, &, if so, will produce it to be attached hereto as an exhibit. I am not acquainted with Mr. Michaels' handwriting so as to

137 state whether this invoice is in his handwriting or not. I first suggested going to Shipman's office. I do not know whether Michaels was acquainted with Shipman before that interview. I don't recollect whether he was introduced to him that night. I think Henry S. Macary introduced Michaels to his father on the stairs of Shipman's office. I don't recollect who entered the office first. I spoke first; I spoke to Mr. Shipman. I told him I had bought the Macarys out, & wanted him to make the papers out for me. I told him that I was to pay 75 cents on the dollar for the stock. The old man Macary was to give up his claim, & Mr. Michaels had agreed to take care of the eastern creditors. I mean, that I said Henry S. Macary had agreed to get his father to give up his claim. He asked them if that was so; & they said it was. I mean, he asked the old gentleman & Michaels. Mr. Shipman went out then. We were then in the back room of Mr. Shipman's office. There were three rooms. This was Mr. Shipman's room in the office where this entire interview took place. I think while Shipman was out Mr. Michaels said to old Macary it was rather a bad business. Mr. Macary answered it was, & asked Michaels what he intended to do for his, Macary's, boys. Michaels replied he could

138 make no promises. That was all that was said in Mr. Shipman's

absence. This is the same absence of Mr. Shipman I referred to in my direct examination. He came back with stationery—some legal-cap paper. On his return he went on & drew up the papers; I don't know what paper he drew first; I do not recollect any further conversation then. He may have been 20 minutes, or perhaps more, drawing the papers. I think at that time it was discovered that there were no stamps; I asked Mr. Michaels to step out & get some. He asked Mr. Shipman what stamps were wanted. Mr. Shipman told him & he went out & got them. I think the stamps were put on all the papers, except the paper signed by H. E. Macary, "Exhibit E." This paper, "Exhibit E," was produced there, but I can't tell whether it was exhibited there at all till it was handed to me with the bill of sale. I don't know whether Mr. Shipman saw that at all at that interview. I don't recollect whether anything was said about this business in Shipman's office while Michaels was gone for the stamps. On Michaels' return I handed Shipman the stamps, & he gave me some to put on my notes. I
139 told Michaels to get the stamps for the notes. The stamps for the notes were spoken of at the same time the other stamps were spoken of. Shipman told him how much to get. I do not know whether he got stamps for three or four notes; I don't know whether he handed me stamps for three or four notes. I think the signing the papers took place next. I do not recollect who signed first. Mr. Shipman wrote out my notes. I think that was done while Mr. Michaels was out. I signed the notes; I am not sure I cancelled the stamps on them. I know I put the stamps on some of them. After the papers were all ready the money was counted. I did not hand the notes to Mr. Shipman. After counting, Mr. Shipman handed back to me the draft, check, & money. I handed the draft, check, & money & notes to Henry S. Macary, & he handed me the bill of sale & the invoice, & the papers signed by his father, & that signed by Harlow E. Macary. I think that Henry S. Macary then handed these notes, money, check, & draft to Mr. Michaels. The whole amount of notes, draft, check, & money so paid over was, I think, $3,482.34, & the notes were three in number, for $870.60
140 each. Mr. Michaels gave Henry S. Macary a paper, being a receipt of that amount in full of all demands, signed Michaels & Levi. We then separated; I think it was then about half-past six o'clock. Mr. Michaels left, I think, on the three o'clock morning train, on 26th October, 1869. I don't recollect what Michaels did with that check. I don't know whether he got the money on it that day. I do not know when that check was paid at the bank. I did not go on the same train with Mr. Michaels. I think next time I went to Hudson I did not go on the three o'clock morning train. I went to Hudson twice before that Saturday, October 30th, 1869; twice after the interview at Shipman's office. I know I was at Hudson on 27th October; I cannot say whether or not I was there two days in succession. I am not sure whether or not I was there on Friday of that week. I think I was there on Tuesday, 26th October. I had an interview with the Macarys on each of those two days I was there. I looked over the stock & made a memorandum the first time I was there; that I am positive of. I think the sign was taken down the first day I was there, & that was the day I made the arrangement for them to work for me.
141 I hired them by the week at $11 each a week. I think I said it was about the beginning of the week, & they could commence as of the beginning of that week, & get their pay Saturday night. I think I heard from Mr. Tibbets about this chattel-mortgage the night before I went from Coldwater to Hudson. Tibbets told me that before I was

there the first time; he told me that late in the night of October 25th, 1869. His name is Barton S. Tibbets; residing at Coldwater. He came to my store & told me about half-past 9 o'clock p. m. He did not say he knew it personally. Mr. Michaels was not there at the time; he was not in the store. I did not see him again or after that that night. He staid at the Southern Michigan Hotel. I think I subsequently notified Mr. Michaels I had discovered this chattel-mortgage; I think two or three weeks after that. It was after I replevied & had got possession of the stock. It was the discovery of this chattel-mortgage, & the discovery by information of another sale, that compelled me to replevy the goods.

Q. Why did you not demand the goods and replevy them the first time you went there after Tibbetts told you of the mortgage?

142 A. I am not positive about finding out about this mortgage on 26th.

Q. Question repeated and reread.

A. I did not see the township clerk to find out such a mortgage existed.

Q. When did you see that clerk to find out such a mortgage existed?

A. I can't recollect.

Q. Was it not prior to Macary Brothers' assignment of the accounts to you?

A. Yes, sir, I did. I want to make an explanation. (Witness, explaining, says:) I had to wait & arrange at Detroit about this mortgage before I could move the goods.

Q. When & where did you ascertain that?

A. I do not recollect.

Q. Why did you not demand & replevy the goods the day you got the assignment of the accounts?

A. I wanted to talk with Mr. Shipman about it first. I cannot say that I took the memorandum of the goods the same day I took the assignment of the accounts. I can't be positive whether on that day I asked Harlow to turn out a cow he had towards paying the Mowry mortgage. I did at some time to do that, & he refused. I discovered the amount of the book accounts assigned to me before I re-

143 plevied the goods. I think Harlow told me the amount, & I took the amount down in a little book I have at home. He told me so on same day after the assignment to me. I think he told me so on the same Saturday I demanded the goods, October 30th. He told me so before I demanded the goods. I do not know what became of that memorandum I made of goods wanted; it is lost. I do not know that it was lost the same day I took it in leaving Hudson. I can't recollect ever seeing it after the day I took it. I think I recollect writing Harlow a letter about it. (Witness is shown complainant's "Exhibit B," attached to the depositions taken at Detroit, & says, "This is that letter.") I think it was written on the day of its date, October 28, 1869. I don't think I was at Hudson on that day, 28th October, 1869. I do not remember at what time in the day this letter was sent. I do not know whether or not I was at Hudson on Friday, 29th.

Q. When you heard by Mr. Tibbetts about this chattel-mortgage, why did you not go to the hotel & inform Mr. Michaels?

A. Tibbetts staid quite a while. I did go to the hotel, & Mr. Michaels had gone to bed & I did not disturb him. I went to the hotel for the purpose of notifying him.

144 Q. Why did you desire to notify him?

A. I think I went to ask him if he knew of any such thing, &

to find out if he had examined down there to ascertain if such a thing existed. I knew then he expected to go out at three o'clock in the morning. I went there about 10 o'clock that night.

Q. Why did you not address to him a letter on the subject & leave it to be delivered to him when he arose to depart?

A. I did not think of it. The three notes I gave on the 25th day of October, 1869, I paid and took up. These are the notes now produced by me. (Put in evidence by complainant & marked Exhibit No. 1, all three being attached together.)

Exhibit No. 1.

Q. To go back to the interview of October 25th, at what stage of that interview did you conclude to give but three notes & pay one-quarter down?

A. I concluded in the store before I went up there to Shipman's office. I think I told Mr. Shipman I concluded to pay one-quarter down & to give my notes for the balance. That was when I told him about the business.

Q. Is it your recollection that nothing was said there about four notes, at 3, 6, 9, & 12 months, for the purchase-price of the stock?

145 A. I think I stated to Mr. Shipman that the agreement was four notes, but I had concluded to pay the first payment in money, as near as I can state it. I said to Mr. Shipman that I was to give my notes payable 3, 6, 9, & 12 months, but I had concluded to pay money instead of the first note. I am not sure whether I stated the terms of payment to him more than once. If more than once, I do not know whether it was substantially the same each time. I do not recollect whether Mr. Shipman destroyed any bill of sale he had drawn or partly drawn, or whether this was the only one drawn. I can't recollect whether or not either of the Macarys left Shipman's office during the interview.

Q. Did they, or either of them, go to tea during the interview, & return to Mr. Shipman's office after tea?

A. Not that I know of. The interview was continuous & uninterrupted by any separation at all. The only absence from beginning to end was when Mr. Shipman went for stationery & Mr. Michaels for stamps, as I have before stated.

Adjourned, by consent, to December 16, 1870, at 10 o'clock p. m., at same place.

(Signed) J. D. HUSBANDS,
U. S. Com'r & Sp. Examiner.

ROCHESTER, *December 15th*, 1870.

146 DECEMBER 16TH, 1870.

Parties appear as on 15th December, 1870. Cross-examination continued by Mr. Post Witness produces papers which he now testifies are the inventory of the stock referred to by him, except that one piece of paper, part of such inventory, is missing, marked complainant's Exhibit No. 2.

Exhibit No. 2.

The witness states that he will search, on his return home, for the missing paper, and if found he will send it to the commissioner, to be attached to Exhibit No. 2, as a part thereof. This is stated and promised at the request of the complainant. I think the missing paper was attached to the bill of sale, & these now here were handed to me separately at Shipman's office, by Henry S. Macary, at the same time.

Q. Are you positive you did not, either directly or indirectly, receive

these papers, constituting Exhibit No. 2, from Mr. Michaels subsequent to the interview at Shipman's office?

A. I am.

(Witness is shown defendants' Exhibit A, bill of sale, & asked:)

Q. Please indicate to us how the paper you speak of as the missing paper was attached to this bill of sale, & to what part of it.

147 A. I do not recollect to what part. I thought it was pinned, but it may not have been.

COUNSEL. Examine this Exhibit A, & point out the pin-hole where it was attached, if any.

A. (Witness refers to a small hole just above the initials "J. D. H.," nearly opposite the word, which will readily attract attention, written "chash." Witness proceeds: I discover no other pin-hole in that neighborhood.

COUNSEL. Examine the paper as much as you wish, for that purpose.

WITNESS. I discover another small hole under the figure 3 in "$\frac{30}{100}$," third line of the writing on this paper; also, one under the first "d" in the word "hundred" in the 5th line of the said writing; also, another over the letter "n" in the word "hundred" in the 8th line of such writing, & just under the 7th line thereof; I discover no other. I think still the missing paper was attached to this "Exhibit A" by a pin.

Q. At which of these places?

A. I could not point it out. When I asked the Macarys on Saturday, 30th October, 1869, for the proceeds of the sales, they gave them to me. That was before I demanded possession of the goods. I

148 do not remember whether or not I mentioned the Mowry chattel-mortgage to the Macarys the first time I went to Hudson after October 25, 1869.

Q. Why did you not mention it?

A. I had not then made the arrangement to take it up. I did go to see the township clerk the first time I went there after 25th October, & he was not in. I think it was the second time after October 25th, that I went down to Hudson, that I testified to in my direct examination, when I got there so early & went into Riddle & Lowe's store. It was on that occasion & at that store that I received the information about the prior sale, which, I have before stated, was one of the causes that impelled me to demand possession & replevy the stock of goods, I think. I think this time I took the train for Hudson that leaves Coldwater at 3 o'clock a. m. I don't think I mentioned the chattel-mortgage on the goods to Mr. Shipman before going to Hudson the first time after 25th October. I am not positive either way about that. I can't say whether I did before going there the second time.

Q. If you did not, can you give any reason why you did not?

149 A. I cannot; I could not get in to get my check cashed at the bank, because I found the bank closed; but I can't state whether or not it was closed for the day. It was after their hour for closing. Their hour for closing is 4 o'clock, & was at that time. Their hours are from 9 a. m. to 4 p. m., & were at that time.

Q. You said yesterday you detached the invoice from the bill of sale, & put the invoice in your pocket. Why did you do that?

A. I don't know.

Q. Describe the paper, the missing paper which you say was attached to the bill of sale. What sort of a paper was it?

A. I don't recollect. I don't know whether it was more than one sheet, or whether it was more than half a sheet. I still think I detached that paper from the bill of sale & put it in my pocket. I don't know

whether I separated this "Exhibit 2" from the bill of sale, or kept the papers comprising it with the bill of sale. I am not positive whether or not I had seen the township clerk about this chattel-mortgage before I mentioned it to the Macary Brothers. I don't think I had procured any $500 draft other than that I have mentioned during the week prior to October 25th, 1869. I don't recollect whether or not I pro-
150 cured during that week any other draft for any amount. I had not paid that $500 draft to Mr. Michaels prior to this transaction of October 25th, 1869. He had not had it at all prior to that time that I know of. It was not Mr. Michaels' property. I don't think I paid Mr. Michaels any draft or money that week for himself or his firm. I can't recollect it when I had made my last payment to Michaels & Levi, or what was its amount. I don't believe I made any payment to Mr. Michaels in any manner during his trip West on that occasion. I do not speak any language other than the English, & I think Mr. Michaels does not.

Re-direct by Mr. O. M. Benedict:

I had not heard of the Mowry chattel-mortgage prior to my purchase of the stock.

Q. Are you entirely certain that there was but one interview at Mr. Shipman's office?

A. I am positive of that.

Recross-examined by Mr. Post:

On receiving the telegraphic despatch on 25th October, 1869, I expected to meet Mr. Michaels on the arrival of the train.

(Signed) LOUIS SLOWMAN.

Taken & sworn December 14th, 15th, & 16th, 1870, & subscribed this 16th day of December, 1870, before me.

[L. S.] (Signed) JO'S D. HUSBANDS,
U. S. Com'r & Special Examiner.

151 NORTHERN DISTRICT OF NEW YORK,
Monroe County, City of Rochester, ss:

DECEMBER 16TH, 1870.

HENRY MICHAELS, being of lawful & full age, having been by me first cautioned & sworn to testify the truth, the whole truth, & nothing but the truth in the said suit, pending as aforesaid, thereupon doth depose & testify as follows, that is to say:

Direct examination by Mr. Benedict:

I am one of the defendants in this action. I was present on the 25th day of October, 1869, at an interview at Mr. Shipman's office, in Coldwater, Michigan. Mr. Shipman, Mr. Macary, (the old gentleman,) Henry S. Macary, Louis Sloman, & myself were present on that occasion.

Q. Please state the transaction of that interview & the whole of it.

A. Mr. Sloman informed Mr. Shipman that he had purchased the stock of Macary Brothers at seventy-five cents on the dollar, & that Messrs. Michaels & Levi had agreed to take care of the creditors in Rochester, & Mr. A. T. Macary, (the father,) was to give his sons a receipt in full for his claim against them, and Sloman instructed Mr. Shipman to make out the papers accordingly. Mr. Shipman asked me if that was so. I said "Yes." Also he asked Mr. A. T. Macary and H. S.

152 Macary if that was so, & they said "Yes." Mr. Shipman then left the room, & came back again in a few minutes after. I think he had some stationery in his hand. Mr. Shipman then drew up a bill of sale. He also drew up a receipt for A. T. Macary to sign, which he did sign. (Defendants' Exhibits "A" & "B" are shown the witness, who testifies:) I think these are the papers drawn on that occasion by Mr. Shipman, & they were signed there by the parties. I had no conversation with A. T. Macary in respect to the sale. Prior to the signing I said to Mr. A. T. Macary, "The boys are in a bad fix." He said they were. That, I believe, is the sum and substance of our conversation. Mr. Sloman, after the bill of sale was drawn, agreed. Mr. Sloman said he would pay the first payment in cash, & give his notes for the balance. Mr. Shipman drew up the papers, & just before going to supper requested me to see if I could not get some stamps. I went down stairs & got some stamps. I returned to Shipman's office & handed the stamps to him, (Mr. Shipman.) He put the stamps on, & Mr. Sloman cancelled these on the notes. After the notes were given they were handed over, with the money, to H. S. Macary. H. S.
153 Macary handed them to me, & I gave him a receipt in full of all *of* demands against Macary Brothers.

Recess one hour.

A. T. Macary gave his paper, Exhibit B, without any promise or assurance from me. So far as I was concerned it was given voluntarily. I know to whom he delivered it. He (A. T. Macary) delivered it to Mr. Sloman. I think he did. I am not positive, but I think he did. The business was all done at one continuous interview. The only separation was that Shipman went out, as I have stated, & I went for stamps. There was no separation for supper, & a return to the office. Mr. Shipman is a lawyer. I did not tell old Mr. Macary that I had agreed to continue the boys in business, or anything to that effect, but the contrary; or to furnish them any goods to sell on any terms whatever. I had not made any such agreement with the Macary Brothers, or either of them. At the time of the sale to Sloman I had not heard of the debt to Mowry, or of a mortgage on the stock.

Cross-examined by Mr. Post:

I think I was at Hudson on Friday, Saturday, & Sunday, 22nd,
154 23rd, & 24th October, 1869. I am positive I was there Saturday & Sunday, & I think on Friday, but I am not so positive of that.

Q. What was your purpose in going there?

A. To see the Macary Brothers.

Q. And to collect your claim against them?

A. No, sir.

Q. Had you any other business there?

A. No, sir. I did not have several interviews with Henry S. Macary, only at the store. I went in the store when I wanted. I think I made this inventory while there—defendants' Exhibit No. 2. It is my writing. I don't think Henry S. Macary came to the hotel on Sunday to see me, except to take me to his house to dinner. I did not have a syllable or word of conversation with him about the business at the hotel. I went to dinner with him where he & his brother resided together. I went to Harlow's room. He was sick. I had no conversation there about the business. The doctor was there, & forbade him to talk about anything, as inflam'ation may set in his head. I had no conversation about the business at the dinner-table. I met both Harlow & Henry
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155 next day at the store. I think that nothing had been said about

going to Coldwater before Monday morning, but I am not positive. Harlow had not been at the store over ten or fifteen minutes when Henry & I left for Coldwater.

Q. How came you & Henry to go to Coldwater?

A. I told them that unless some arrangement was made I should throw them into bankruptcy. We went to Coldwater to see if his father would forego his claim. I spoke to them on Saturday about throwing them into bankruptcy. I can't tell whether or not I again spoke of that on Monday. I can't tell who suggested going to Coldwater, whether I or they. I know Henry telegraphed his father to meet him. It was not arranged to sell out to Sloman before going. Something was spoken about it; no arrangement made. I can't tell who suggested that. I don't know. I don't know who suggested selling out at all. It was general remarks—general conversation.

(Witness is shown defendants' Exhibit E, (H. E. Macary's consent,) and he testifies:)

The body of this paper is my handwriting; that was prepared & signed before leaving Hudson. A telegram was sent to Sloman,
156 but I don't know who sent it or signed it; it was either Henry or me. I can't tell whether it was sent at the same time the dispatch was sent to A. T. Macary. I was acquainted with Shipman before that Monday. He never acted as my attorney. On that day I did not go to Shipman's office before the rest of them. We all went together. I received the three Sloman notes & some money, the amount of the first payment consisting of draft about $500, cash about $200, & check about $170. It was Sloman's check on the bank of Rose, Bowen & Rose, I think. I can't describe the draft, except to say it was on New York for about $500. I can't tell to whom it was payable. I brought the check home with me, I think. The check has since been paid. I brought the three notes home with me. They have since been paid, and I have received the money. I don't know who paid Mr. Shipman for his services. I did not. Nothing was said there in my presence about paying him. We all left Shipman's together, & I went to the hotel to supper. I saw Sloman after supper at his store. After supper A. T. Macary & Henry S. Macary were in Sloman's store. We had no conversation there
157 about business. I left Sloman between 8 & 9 o'clock p. m., & went to bed, expecting to leave at one o'clock a. m. I left there at that time, and did not stop at Hudson. I think Henry S. Macary had this inventory when we left Hudson for Coldwater; I think so, but am not certain. I think he produced it at the interview at Shipman's. I am certain it was there at Shipman's. I had never seen the $500 draft before that interview at Shipman's office. Sloman had not paid me anything in any way the week before. I was at Coldwater before going to Hudson, just between trains. I made no stop between Coldwater and Hudson.

Q. During any of these interviews, at Hudson, with Henry S. Macary, prior to going to Coldwater, did you state to Henry S. Macary that Mr. Sloman had paid you a draft for $500, or any other amount?

A. No, sir; I did not show him any draft which had been so paid.

(Signed) H. MICHAELS.

Taken, subscribed, & sworn this 16th day of December, 1870, before me.

[SEAL.] (Signed) J. D. HUSBANDS,
U. S. Commissioner & Sp'l Examiner.

158 NORTHERN DISTRICT OF NEW YORK, *ss:*

I do hereby certify that the testimony & depositions of the said witnesses were carefully read to them respectively, & was signed by each of them in my presence. I do further certify that I am not of counsel nor attorney for either party to the said suit above entitled at the commencement of the first of said depositions.

Witness my hand & official seal, at Rochester, in the county of Monroe, & State and northern district of New York, this 16 day of December, 1870.

[SEAL.] (Signed) J. D. HUSBANDS,
U. S. Commissioner & Special Examiner.

159

160 The circuit court of the United States for the northern district of New York. In equity.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Harlow H. Macary and Henry Macary, complainant,
vs.
HENRY MICHAELS & NATHAN LEVI, DEFENDants.

Testimony taken in the above-entitled cause before the undersigned, Frank L. Skeels, as special examiner, by consent of counsel for the respective parties, commencing November 14th, 1871, at the city of Coldwater, Michigan.

Hoyt Post, esq., the complainant, appeared in person, & O. M. Benedict, esq., appeared as counsel for the defendants.

LLEWELLEN JOHNSON, a witness produced, sworn, and examined on the part of and in behalf of the complainant, testifies and deposes as follows:

I reside in the city of Coldwater; am a telegraph operator, and am thirty-three years of age. I am a telegraph operator in the office in this city, at the depot, the same being the only telegraph office in the city. We keep a record in our office of all despatches received
161 and sent. I think I have a complete record of all despatches received at and sent from my office for the last three years. The record contains the names and addresses of parties sending and receiving despatches. We keep the body of the despatches separately. I furnished Mr. Louis Sloman about fifteen minutes ago a complete copy of all dispatches received at the office addressed to him from the 23rd day of October, 1869, to Nov. 30th, 1869, inclusive. I also furnished him, December 8th, 1870, a copy of a message received by him on the 25th day of Oct., 1869.

Ques. Can you produce a copy of the despatch received by Louis Sloman October 25, 1869?

Ans. I can. I have a copy of it in my books.

Ques. State from whom & from where that despatch came.

Ans. I shall have to decline to answer that question, for the reason that I am instructed by the company by whom I am employed not to disclose such matters.

Ques. Will you produce a copy of that despatch to be attached to your evidence as an exhibit?

Ans. I shall have to decline to do so, for the reason mentioned above.

A cross-examination of the witness was waived by the counsel for the defendants.

L. L. JOHNSON.

This deposition was by me reduced to writing, read over to the witness, and by him subscribed in my presence this fourteenth day of November, A. D. 1871.

FRANK L. SKEELS,

162 *Special Examiner in the above-entitled Cause, by consent of Counsel.*

The further examination of witnesses in the above-entitled cause was adjourned by consent of counsel until Wednesday morning at eight & one-half o'clock.

FRANK L. SKEELS,
Special Examiner.

WEDNESDAY MORNING, *November 15th*, 1871.

Examination of witnesses on the part of & in behalf of the complainant resumed. The complainant appeared in person, and O. M. Benedict, esq., appeared as counsel for the defendants.

WILLARD J. BOWEN, a witness produced, sworn, and examined on the part of & in behalf of the complainant, testifies and deposes as follows:

I am thirty-one years of age; am a resident of the city of Coldwater, and am engaged in the banking business. In October 25th, 1869, I was a member of the firm of Rose, Bowen & Rose. That firm has since been dissolved, & was succeeded by myself; & I have since been succeeded by the firm of Bowen & McGowan. I have in my possession the account-books & vouchers of the firm of Rose, Bowen & Rose. I have the means of telling whether a draft was drawn by the firm of Rose, Bowen and Rose, in favor of Louis Sloman or Michaels and Levi in the month of October, prior to the 25th day , 1869. The stubs of the draft-book will show.

163 Witness produces the draft-book, by request of the complainant, and, upon examination, states that on the 18th day of October, A. D. 1869, a draft was drawn by the firm of Rose, Bowen & Rose on the banking-house of Howes & Macey, of New York, in favor of Michaels and Levi, for the sum of four hundred & ninety-eight & $\frac{75}{100}$ dollars; the number of the draft being 13015.

The witness further states that the books show another draft drawn by the same firm on the same parties, in favor of the same parties as above, for the same amount, dated Oct. 22, 1869, being numbered 13045. The books do not show any draft in favor of Louis Sloman from the first day of October, 1869, to the twenty-fifth day of the same month inclusive.

The drafts drawn by us are returned to us after payment. The aforesaid drafts, 13015 & 13045, were produced and identified by the witness as belonging to the stub mentioned in the draft-book, & represent five hundred dollars each, less exchange. The witness prefers that the original drafts remain in his possession. It is consented that the examiner make copies of the aforesaid draft to be hereto attached as exhibits.

(Counsel for defendants objects to all of the foregoing evidence as immaterial & irrelevant.)

I know in whose handwriting the original drafts are. It is the handwriting of Lester E. Rose, one of firm of Rose, Bowen & Rose, in October, 1869. I think I was not here when the drafts were returned. I think they were returned about the 3d of November following,
164 & I did not return until the day after Thanksgiving, in the year 1869. I find the above-mentioned drafts returned in the statement of Mess. Howes & Macy as paid by them, and charged to the firm of Rose, Bowen & Rose; and the drafts were returned by them and charged to the firm of Rose, Bowen & Rose, among the other vouchers, as having been paid by them during the month of October, 1869, in the usual course of business.

Mr. Louis Sloman had a deposit account with the firm of Rose, Bowen & Rose during the month of October, 1869, I think. I have the ledger containing that account.

The witness here produced the ledger containing the account of L. Sloman for October, 1869, and stated that the transcript hereto attached, marked Exhibit "C," is a true transcript of that account for that month. The entries of above account in the ledger containing the same are in the handwriting of Chas. T. Allen, at that time book-keeper for the firm of Rose, Bowen & Rose. It is consented on the part of the defendants that this transcript hereto attached, marked Exhibit "C," be taken as correct, the same as if testified to by Mr. Allen. The entry, dated October 22d, 1869, on the transcript marked Exhibit "C" in Mr. L. Sloman's account, indicates that he received five hundred dollars of his money in some form on that day. The entry of five hundred dollars in the column of checks is referred to. The entry, dated Oct. 18,
165 1869, on the transcript marked Exhibit "C" in the column of checks, indicates that Mr. Sloman had eight hundred & $\frac{50}{100}$ dollars of his money in some shape on that day.

I have the bank journal for the 18th & 22d days of October, 1869. The entries therein of that date are in the handwriting of Charles T. Allen, mentioned above. The transcript hereto annexed & marked Exhibit "D" is a true transcript of the journal of the firm of Rose, Bowen & Rose of those dates of the account of Mr. L. Sloman.

(Counsel for defendants consents that the entries in the journal above mentioned be taken as proven the same as if sworn to by Mr. Allen.)

The witness identifies the entries in the journal of the dates October 18th & 22d, 1869, as being the same posted in the ledger of that date. The numbers in the transcript of the journal on the debit side 60, 61, 59, 62, on the 18th day of October, 1869, and the number 63, on the 22d day of October, 1869, indicate the numbers of the checks given for the amounts drawn. The checks are returned to Mr. Sloman as often as the books are balanced as vouchers. All of the above testimony is taken subject to the objection of incompetency & irrelevancy & immateriality to this action.

Cross-examined by the counsel for defendants:

I was not present at the time the drafts 13015 and 13045 were drawn, and can only testify to what the books show. I cannot say to whom the drafts were issued; they might have been issued to Mr. Sloman or some agent of Michaels and Levi, or to some other person remitting to
166 them. If Mr. Sloman came here with five hundred dollars in money and bought a draft, it would be a separate transaction, and would not appear on Mr. Sloman's account. It is quite frequently that parties do business with us in that way. Parties sometimes come to purchase drafts when they have not a sufficient balance to pay for the

draft, in which case they pay the deficiency in money or give a check for what they have; sometimes customers bring in New York exchange of their own and exchange it for drafts; in that case it would be a separate transaction closed at the time and would not appear in the customers' account.

WILLARD J. BOWEN.

This deposition was by me reduced to writing, read over to the witness, and by him subscribed in my presence this 15th day of November, A. D. 1871.

FRANK L. SKEELS,
Special Examiner in the above-entitled Cause by consent of Parties.

The further examination of witnesses in the above-entitled cause was adjourned by consent of counsel until two o'clock p. m. of this day, November 15th, 1871.

FRANK L. SKEELS,
Special Examiner.

Examination of witnesses on the part of and in behalf of the defendants resumed at two o'clock p. m. The complainant appeared in person, and O. M. Benedict, esq., as counsel for the defendants.

167 JOHN B. SHIPMAN, a witness produced, sworn, and examined on the part of and in behalf of the defendants, deposes and testifies as follows:

I am thirty-nine years of age, and by occupation a lawyer, residing in the city of Coldwater. I remember that in the fall, during the sitting of our circuit court, in 1869, that Mr. Michael, the old man Macary and one of his sons, and Mr. Sloman came into my office, and a bill of sale was drawn. Those parties were in but once. I was very busy in court and was in my office, and word came from the front room that some one wished to see me. I went into the front room, and in there I found Mr Michaels, Mr. Macary, the old gentleman, the young Mr. Macary, Henry. Something was said to me about their wanting some papers drawn. I found that for some reason, but what I can't remember, they were not quite ready for me. I said I would go back to work in the back office and when they were ready for me to let me know. I returned to the back office. It was ten or fifteen minutes afterwards that the parties came into the back office. I can't say in what order the parties came in. Mr. Sloman was present with them during the interview. I can't recollect all that was said during the interview; but I recollect it was settled, and seemed to have been settled before the parties came into my back office, that I was to draw a bill of sale of the goods in the store of the Macary Brothers, at Hudson, to Sloman. The goods consisted of clothing and gents' furnishing goods. Then there was to be drawn

168 some kind of a paper from A. T. Macary, consenting to the transfer and disclaiming any interest in the goods. I asked the old gentleman, A. T. Macary, about his business with the young men, and as to whether he had any claim on the goods. He said he had no claim on the goods. I then asked him if the young men owed him anything, and he said that they did; the amount of their indebtedness to him was $2,000, or twenty-two hundred dollars. I asked him if it was due, or when it would be due. He said it was not due, but would be either two years from the previous August or three years therefrom; I can't recollect which it was said. I asked him if the indebtedness drew interest. He hesitated, looked

at Henry, and said no; does it? and Henry said no. I went over that ground two or three times so that I might not misunderstand him. I then asked him what interest he had in this transaction. He said he had none. I asked him what kind of a paper he wanted drawn. He said he did not know, but he wanted some paper showing that he had no interest, and consented to the transfer. I then drew the bill of sale to Sloman, and then drew a paper for A. T. Macary to sign. The first one I drew for him was a long paper, a page and a half, I should say, of law-paper, and read it over aloud. There was some objection raised, but by whom I can't say, that the paper was too long. I twisted up that paper and threw it into the waste-basket, and when my attention was called to the matter some two weeks after, I could not find it, and suppose it was thrown into the stove. I then drew a shorter paper; my recollection is about
169 a quarter of page. I drew it very hurriedly. I recollect there was an inventory here. I can't recollect who had it. The bill of sale and the paper for A. T. Macary were read over to the parties and signed. Then Sloman paid over to the Macarys a larger amount of money than it was expected he was to pay them. I think he anticipated one of the payments, upon which he was to have had some time. I can't recollect of any of the amounts of the payments. Sloman passed over to Henry Macary something, I think a draft, & some greenbacks; not a large amount of greenbacks, however, as I recollect, and a check on Rose, Bowen & Rose. My recollection is that I filled up the check, but I can't tell the amount of it. The money, draft, and check received by Henry Macary was, I think, by him handed over to Michaels. I have a very vague recollection of drawing a receipt for Michaels to sign, to be given to the Macarys. My recollection is very indistinct as to the contents of the receipt. I remember a blank-book; but whether it was a check-book or blank book of notes I am unable to state. I can't say that I recollect specifically about the notes. Something was said during the transaction about some stamps, and some one produced stamps, or went and got some, which I can't say; but on what the stamps were put I can't say. I can't state who asked to have the papers drawn. My recollection is that it was a concluded arrangement before they came in. Mr. Sloman was here & took part in the conversation, but I
170 can't state whether he was in all of the time. I can't say whether it was Mr. Sloman who asked to have the papers drawn. My recollection is that they all understood what was wanted when they came in. I asked Mr. A. T. Macary specifically as to the nature of the paper he wished drawn up for him to sign, and read the paper that he did sign over to him more than once. After the papers were finished and delivered Mr. Sloman produced a draft, some greenbacks, and a check. My recollection is that the check was filled up here—that is my best recollection—but still it may have been the notes that were filled up instead of the checks, but possibly both. The transaction was finished at one sitting. It crowded me over to a late hour for my tea. My tea-hour was six o'clock, and my recollection is that the transaction detained me about half an hour beyond that time. The parties did not come back again.

Cross-examination by the complainant in person:

My recollection of what I have stated is rather more distinct than of ordinary transactions in the office, for the reason that the trouble in regard to the goods began so soon afterwards. When the parties first sent for me to come into the front office it was late in the afternoon, and they might have been there much longer than fifteen minutes, or

less than that. I was busy in the back office. Mr. Sloman was not present when I first went into the front office. There was some reason, but what I can't recollect, why they were not prepared to go on
171 with the transaction. I can't state whether Mr. Sloman came into the back office with the other parties, or before or after them, but I am certain he was in before a paper was drawn, and while it was being talked what papers were to be drawn; and Sloman was one of the persons talking. My recollection is that there was more paid down than was first talked over. I can't recollect whether I counted the money or not. I saw a paper that was said to be a draft for such an amount. The draft-money and check were called such an amount. My recollection is that Mr. Sloman put down the draft, the money, & the check, stating that there was such an amount. Mr. Henry Macary looked the money over and took it, and I think he passed the full amount he received over to Mr. Michaels. I am quite certain there was a draft. I don't remember whether I put the stamps on or not. I think they were put on here. I don't recollect of seeing Sloman that day prior to the time spoken of above. I do not know to whom this draft was payable. I do not know to whom the check was payable. I don't recollect whether the inventory was attached to the bill of sale or not. I saw, a good while ago, a copy, or what purported to be a copy, of some testimony taken in this cause at Rochester. I saw it here. Some one handed it to me. I think it was about a year ago. All the pay I ever received for drawing the papers I received of Sloman. I recollect
172 that something was said here that day as to how the store should be run at Hudson. I had seen Michaels several days before this, & had a general conversation with him, wherein he stated that he had a claim against the Macarys of Hudson. He said he did not know but he might want my services in the matter. While the papers were being drawn I think the amount of Mr. Michaels' claim was stated, but I can't recollect now the amount of it. I acted as Sloman's attorney after that in the replevin suit that was brought, and in advising him with reference to obtaining the possession of the goods. My best recollection is that in getting at the consideration of the bill of sale and the price to be paid, a certain discount was to be made from the inventory, and I figured that. I figured down from the inventory the amount that was stated he was to pay on the dollar. Then I divided that up into the payments, I think. I think all took part in the conversation. I think Mr. Michaels did. I don't recollect who told me what per cent. was to be paid.

JNO. B. SHIPMAN.

This deposition was by me reduced to writing, read over to the witness, and by him subscribed in my presence, this 15th day of November, A. D. 1871.

FRANK L. SKEELS,
Special Examiner.

LOUIS SLOMAN, a witness produced, sworn, & examined on the part of and in behalf of the complainant, testifies and deposes as
173 *as* follows: I have procured within a day or two a copy of a despatch, sent to me on the 25th day of October, A. D. 1869. I procured it from the telegraph operator.

Witness here showed a despatch or a copy of a despatch, which is hereto attached and marked Exhibit "E," and identifies it as a copy of the dispatch referred to by him in his testimony, at Rochester, as hav-

ing been received on the 25th day of October, A. D. 1869. I don't think I have in my possession my checks drawn on Mess. Rose, Bowen & Rose, during the month of October, 1869, numbered from 59 to 63, both inclusive. I sent all of my papers, from the time I have been in business, I think, up to this year, home to my partners in Rochester, New York. I do not know of a firm of the name of J. B. Atwood & Co. I don't think I ever had any business with it. I think the original of the despatch marked Exhibit "E" was destroyed. I think Exhibit "E" is a true copy of the original.

LOUIS SLOMAN.

This deposition was by me reduced to writing, read over to the witness, and by him subscribed, in my presence, this 15th day of November, A. D. 1871.

FRANK L. SKEELS,
Special Examiner.

HARLOW E. MACARY, a witness heretofore sworn in this cause, recalled on the part of and in behalf of the complainant, testifies and de-
174 poses as follows: I saw Mr. Michaels on the morning of the 25th day of October, A. D. 1869, at the store of the Macary Brothers, in Hudson. He made a statement to me at that time in regard to Sloman's having made a payment.

(Counsel for defendants objects to any evidence from the witness as to what Michaels said as being immaterial.)

Mr. Michaels told me that before he left Coldwater, Mr. Sloman paid him all the money he had on hand, and that he had overdrawn his bank-account. I think this statement was made by Mr. Michaels in connection with the amount he wanted. It was during a conversation with reference to my own affairs.

Cross-examined by counsel for defendants:

This conversation took place at the store of Macary Brothers, in Hudson, between the hours of ten & twelve o'clock in the forenoon. My brother was in the store at the time. I can't state whether he heard the conversation or not.

Ques. How did Mr. Michaels come to tell you this?

Ans. I can't say positively. It was during the conversation in regard to the business of myself and brother with Mr. Michaels. I had not asked Mr. Michaels anything in regard to Louis Sloman. Up to that time I can't state whether Mr. Sloman's name had been mentioned. His name was mentioned, but I can't say whether it was before or after that. Mr. Michaels had not shown me any notes, draft, or anything, up to that time. I think Mr. Michaels mentioned the amount
175 that Mr. Sloman paid him. I can't state what the amount was, but I think it was between $475 & $500.

Ques. Please state in round numbers what amount Mr. Michaels said Mr. Sloman had paid him.

Ans. My impression is that he said about $500. He said he received it the day before he came to Hudson. I don't remember whether he told me in what shape it had been paid him. He told me that in making that payment to him, Mr. Sloman had been obliged to overdraw his bank-account. I don't recollect as he told me the amount he overdrew. Mr. Michaels left for Coldwater on the first train out of Hudson. I think the train left between the hours of twelve and two p. m. I did not come here with him. My brother Henry came with him. Mr. Michaels asked one of us to come with him.

HARLOW E. MACARY.

This deposition was by me reduced to writing, read over to the witness, and by him subscribed, in my presence, this 15th day of November, A. D. 1871.

FRANK L. SKEELS,
Special Examiner.

WILLARD J. BOWEN, a witness heretofore sworn in this cause, recalled on the part of the complainant, and in his behalf testifies and deposes as follows:

I have examined the stubs in the draft-book mentioned above, and find no other draft for the sum of $500, less exchange, except one
176 to J. B. Atwood & Co. payable to their order, between the dates of October first and October the 26th, 1869.

Cross-examination:

We issue other drafts that would not appear in this book. We kept a book for our Detroit and one for our Chicago correspondents, and sometimes drew drafts on another New York house, Henry Clews & Co., to whom we sent bonds and gold for them to sell, and drew on them, making the drafts payable to our regular correspondents, Howes & Macy. There might have been a draft purchased during the month of October, 1869, on the firm of Henry Clews & Co. that would not appear on this book.

WILLARD J. BOWEN.

This deposition was by me reduced to writing, read over to the witness, and by him subscribed, in my presence, this 15th day of November, A. D. 1871.

FRANK L. SKEELS,
Special Examiner.

Fees, $12.50.

177

178 EXHIBIT "A."—FRANK L. SKEELS, *Circuit Court Commissioner & Special Examiner.*

No. 13015.] BANKING-HOUSE OF ROSE, BOWEN & ROSE,
Coldwater, Mich., Oct. 18th, 1869.

Pay to the order of Michaels & Levi four hundred ninety-eight & $\frac{75}{100}$ dollars in current funds.
$498.75.]

ROSE, BOWEN & ROSE.

To Messrs. HOWES & MACY,
New York.

(Indorsed:)
Pay Hettheimer, Tone & Co., or order.

MICHAELS & LEVI.

Pay Importers' & Traders' Nat. Bank, or order.

HETTHEIMER, TONE & CO.

Importers' & Traders' National Bank. Paid.

179 EXHIBIT "B."—FRANK L. SKEELS, *Special Examiner.*

BANKING-HOUSE OF ROSE, BOWEN & ROSE,
Coldwater, Mich., Oct. 22d, 1869.

$498.75.] [No. 13045.

Pay to the order of Michaels and Levi four hundred ninety-eight & $\frac{75}{100}$ dollars in current funds.

$498.75.]

ROSE, BOWEN & ROSE.

To Messrs. HOWES & MACY,
New York.

(Indorsed:)

Pay Stettheimer, Tone & Co., or order.

MICHAELS & LEVI.

Pay Importers' & Traders' Nat. Bank, or order.

STETTHEIMER, TONE & CO.

Importers' & Traders' National Bank. Paid.

180 EXHIBIT "C."—FRANK L. SKEELS, *Special Examiner.*

L. SLOMAN.

Date.	Deposits.	Checks.	Balances.	Overdrawn.
1869.				
Oct. 2		58 34	479 74	
4	100		579 74	
5	50		629 74	
6	104 50	200 50	533 74	
8		506 04	27 70	
9		31 35		3 65
11	100		96 35	
12	100		196 35	
14	100		296 35	
15	250		546 35	
16	100		646 35	
18	100	800 50		54 15
19	100		45 85	
22	200	500		254 15
23	100			154 15
26	170 59	170 59		154 15
27	150			4 15
28	150		145 85	
29		100	45 85	

181

182 EXHIBIT "D."—FRANK L. SKEELS, *Special Examiner.*

	OCT., 1869.			OCT., 1869.		
8	L. Sloman, c'y	100	18	L. Sloman, $60	100 25	
				"61	100 25	
				"59	500	
				"62	100	
						800 50
:	L. Sloman	200	22	L. Sloman, $63		500

183

184 EXHIBIT "E."—FRANK L. SKEELS, *Special Examiner.*

HUDSON, *Oct.* 25, '69.

L. S.:
Expect me next train. Tell lawyer to be in office.
H. MICHAELS.

P'd.

185 COMPLAINANT'S EXHIBIT, No. 1.

7	ties	5*s*.	4 37
6	do.	4	3 00
5½	armlets, at	10	6 70
10	bows	2*s*.	2 50
6	do.	20..	1 20
7	do.	2*s*.	1 75
12	do.	20..	2 40
4		30..	1 20
23		1*s*	2 87
5		40..	2 00
3		40..	1 20
10		30..	3 00
4		35..	1 40
17		12..	2 12
8		25..	2 00
7		40..	2 80
6		20..	1 20
8		30..	2 40
12		22..	2 64
980	collars	30	29 40
790	do.	16..	12 54
810	do.	12..	10 80
890	do.	1.80..	16 02
			115 49

500		15.00..	7 50
410		13.00..	5 33
10	socks	40..	4 00
10		15..	1 50
17		21..	3 57
12		20..	2 40
23		12..	2 70
3	satchel	1.07..	3 75
6	do.	1.15..	6 90
5	do.	1.10..	5 50
5	do.	80..	4 00
4	do.	70..	2 80
5		65..	3 25
2		50..	1 00
4	umbrellas	1.00..	4 00
4	do.	80..	3 20
6	do.	70..	4 20
1	do.	1.25..	1 25
6	straw hats	1.00..	6 00
3	do.	70..	2 10
5	do.	80..	4 00
1	do.		75
2	do.	7*s*.	1 75
			81 51

186 SHIRTS, (over.)

6		12*s*.	9 00
2		1.63..	3 25
9		1.50..	13 50
2		15*s*.	3 75
18		9*s*.	20 25
7		7*s*.	6 12
25		6..	18 75
4		65..	2 60
2		16*s*.	4 00
8		4*s*.	4 00
17		12*s*.	25 50
7		10*s*.	8 75
7		1.30..	9 10
1			1 87
3		10*s*.	3 75
6		11*s*.	8 25
3		12*s*.	4 50
1			2 00
1			1 12
			$150 06

CARDIGAN JACKETS.

10		1.60..	16 00
11		6*s*.	8 25
5		1.15..	5 75
1			1 60
1			75
1			2 75
			35 10

WRAPPERS & DRAWERS.

8	A draw	45..	3 40
5	wrap	45..	2 25
25		3*s*.	18 75
39		55..	21 45
1			65
3		7*s*	2 63
2		65..	1 30
23	O. S.	75..	17 25
9	ov'll	65..	5 85
14		46..	6 44
3	scarf	3*s*.	1 12
			$81 09

No. 2. J. D. H.

5	shirts	75..	3 75
3	"	1.00..	3 00
6	drawers	1.00..	6 00
4	white sh'ts	7*s*.	3 50

187 SUSPENDERS.

7		22..	1 54
11		25..	3 85
10		22..	2 20
7		35..	2 45
10		40..	4 00
12		35..	4 20
12		35..	4 20
15		25..	3 75
5		45..	2 25
2		35..	70
11		30..	3 30
6		40..	2 40
2		2*s*.	50
11		1*s*.	1 38
11		30..	3 30
24		2*s*.	6 00
2		45..	90
2		30..	60
3		35..	1 05
6		55..	3 30
4		75..	3 00
4		70..	2 80
4		70..	2 80
11		75..	8 25
			68 64
Wrappers, drawers, &c.			175 29

188 FURNISHING GOODS.

11	p'r wristlets	30..	3 30
10	do-	22..	2 20
11	hose	40..	4 40
6	do.	40..	2 40
6	do.	40..	2 40
8	do.	1*s*.	1 00
5	do.	22..	1 10
1	do.		30
12	do.	22..	2 64
3	do.	30..	90
12	do.	18..	2 25
12	do.	30..	3 60
9	do.	22..	1 98
12	do.	18..	2 25
12	do.	30..	3 60
12	do.	30..	3 60
17	do.	2*s*.	4 25
220	p'r cuffs, at	3. 00..	6 60
190	bosoms at	3c.	5 70
24	h'dk'fs	12c.	3 00
8	do.	2*s*.	2 00
2	do.	4*s*.	1 00
			60 47

6		1. 00..	6 00
5		90..	4 60
4		12*s*.	6 09
			113 84

GLOVES.

11		50..	5 50
9		6*s*.	6 75
10		6*s*.	7 50
3		6*s*.	2 25
4		1. 00..	4 00
5		87½.	4 37
4		6*s*.	3 00
5		1. 00..	5 00
13		12*s*.	19 50
9		60..	5 40
2		1. 60..	3 20
5		12*s*.	7 50
11		10*s*.	13 75
11		14*s*.	19 25
8		1 00..	8 00
8		6*s*.	6 00
10		1. 35..	13 50
9		1. 45..	13 05
5		1. 00..	5 00
8		1. 00..	8 00
10		22..	2 20
			162 72

WRAPPERS, DRAWERS, & SHIRTS.

Bro't for'd			113 84
4	shirts	1. 50..	6 00
11		15*s*.	20 57
1			1 38
6		11*s*.	8 25
3		15*s*.	5 63
7		9*s*.	7 87
2		12*s*.	3 00
5		14*s*.	8 75
20	h'dk'f	30..	6 00
6	do.	1*s*.	75
3		2*s*.	75
10		28..	2 80
12		21..	2 52
2	bosom	2*s*.	50
10	ties	1*s*.	1 25
35	do.	1*s*.	4 38
9	do.	2*s*.	2 25
12	do.	30..	3 60
9	do.	20..	1 80
4		2*s*.	1 00
9		30..	2 70
7		15..	1 05
6		2*s*.	1 50
9		30..	2 70
6	do.	20..	1 20
6	do.	30..	1 80
4	do.	25..	1 00
4		25..	1 00
3		30..	90
3		5*s*.	1 87
4		3*s*.	1 50
			44 82

189	1 vest	..	1 75
	3 do.	14..	5 25
2	do.	18..	4 50
4		14s.	7 00
4		15s.	7 50
5		16s.	10 00
1			2 00
3		14s.	5 25
6		15s.	11 25
2		18s.	4 60
3		2.00..	6 00
4		1.75..	7 00
2		13s.	3 25
5		12s.	7 50
1			1 37
4		10s.	5 00
3		11s.	4 12
5		12s.	7 50
7		10s.	8 75
4		10s.	5 00
2		12s.	3 00
2		6s.	1 50
1			1 00
3		12s.	4 50
			124 50
190	11 vest	1.75..	19 25
	2	14s.	3 50
3		13s.	4 87
7		14s.	12 25
7		16s.	14 00
4		14s.	7 00
3		1.50..	4 50
3		14s.	5 25
3		2.00..	6 00
7		15s.	13 13
3		15s.	5 62
4		2.00..	8 00
6		15s.	11 25
1			2 00
2		18s.	4 50
2		16s.	4 00
1			2 25
2		2.00..	4 00
1			1 75
10		2.00..	20 00
2		2.00..	4 00
1			1 75
1			2 00
			160 87

No. 2. J. D. H.

191	1 coat	11.00..	11 00
	1 do.	8.00..	8 00
1	do.	11.00..	11 00
1	do.	11.00..	11 00
2	do.	11.00..	23 00
1	do.	9.00..	9 00
1	do.	9.50..	9 50
1		8.50..	8 50
1		9.00..	9 00
1		9.00..	9 00
1		9.00..	9 00
1		8.00..	8 00
1		9.00..	9 00

No. 2. J. D. H.

5	vest	1.00..	5 00
5		12s.	7 50
2		11s.	2 75
1			1 25
4		12s.	6 00
2		14s.	3 50
3		12s.	4 50
2		12s.	3 00
1			75
7		12s.	10 50
1			1 00
4		13s.	7 50
5		15s.	9 30
2		14s.	3 57
5		15s.	9 38
			75 50
			124 50
			160 87
	Vest		360 78

2	coats	6.75..	13 50
1	do.	7.00..	7 00
3	"	6.00..	18 00
1	coat	..	5 50
1		..	4 00
2	d.	5.00..	10 00
1		..	5 25
1		..	6 25
2		6.00..	12 00
1		..	6 00
3		18s.	6 75
1		..	3 00
1		..	5 00

1		..	8.00..	8 00	1	..	5 00
1		..	8.00..	8 00	1	.. 3.00, 4.00..	7 00
1		..	9.00..	9 00	3	.. 6.50..	19 50
1		..	9.00..	9 00	1	.. 8.00; 2 6.50..	21 00
7	do.	..	9.00..	63 00	4	.. 7.00..	28 00
2		..	5.00..	10 00	2	.. 8.00..	16 00
1		..	..	6 75	6	.. 5.50..	33 00
5		..	5.00..	25 00	4	.. 4.50..	18 00
3		..	6.75..	20 25	4	.. 4.00..	16 00
1		..	..	6 00	4	.. 4.50..	18 00
			301 00				283 75
							299 00
							582 75
192	1 coat	..	..	4 50	1 coat	..	..
	6 do.	..	4.50..	27 00	3 do.	.. 8.50..	25 50
3		..	4.00..	12 00	2	.. 7.50..	15 00
1		..	..	6 50	2	.. 8.00..	16 00
1		..	..	8 50	1	..	..
2		..	8.00..	16 00	4	.. 8.00..	32 00
1		..	..	6 50	1	..	9 50
1		..	..	9 00	6	.. 10.75..	64 50
1		..	..	8 50	1	..	9 00
1		..	..	6 50	3	.. 10.50..	31 50
1		..	..	8 50	4	.. 9.50..	38 00
1		..	..	9 00	1	..	10 00
1		..	..	8 00	2	.. 11.00..	22 00
4	coats	..	6.50..	26 00	2	.. 10.00..	20 00
8		..	8.50..	68 00	4	.. 9.00..	36 00
5		..	7.00..	35 00	1	..	11 00
5		..	7.00..	35 00	1	..	8 00
7		..	8.00..	56 00	2	.. 11 ..	22 00
2		..	8.50..	17 00	3	.. 10 ..	30 00
7		..	8.00..	56 00	10	.. 6.50..	65 00
1		..	..	8 50	1	.. 8.50, 7.50, 7.50..	23 50
5		..	7.00..	35 00	2	.. 6.50..	13 00
3		..	7.50..	22 50	4	.. 2.00..	8 00
				489 57			524 50
193	Pants	..	..	4 63	1	pants ..	.. 5 00
	4 do.	..	5.00..	20 00	3	do. .. 5 ..	15 00
7	"	..	5.00..	35 00	4	.. 4.25..	17 00
2		..	5.50..	11 00	1	..	7 00
10		..	5.25..	52 50	5	.. 2.75..	13 75
2		..	5.25..	10 50	3	.. 4.50..	13 50
1		..	..	5 00	6	.. 4.50..	27 00
3		..	5.50..	16 50	2	.. 3.00..	6 00
1		..	..	5 00	4	.. 20s.	10 00
5		..	5.00..	25 00	5	.. 5 ..	25 00
3		..	5.50..	16 50	2	.. 4.50..	9 00
2		..	5.25..	10 50	2	.. 5.25..	10 50
7		..	5.00..	35 00	1	..	3 75
1		..	..	5 50	1	..	4 50
7		..	4.75..	33 25	1	..	5 25
6		..	5.25..	31 50	1	..	4 50
2		..	5.00..	10 00	1	..	5 00
2		..	5.25..	10 50	4	.. 2.75..	11 00
1		..	..	4 75	4	.. 20s.	10 00
4		..	5.50..	22 00	3	.. 5.25..	15 75
3		..	5. ..	15 00	4	.. 3.75..	15 00
4		..	5.25..	21 00	1	..	5 50
2		..	4.63..	9 25	1	..	3 75
					1	..	3 75
				409 87			246 50

3 hats	2.00..	6 00	
5	2.38..	11 87	
4	10s.	8 00	
7	1.00..	7 00	
4	1.00..	4 00	
1	..	1 75	
4	10s.	5 00	
1	..	2 00	

No. 2. J. D. H.

194	Hats		299 00
	do.		283 75
	do.		489 50
	do.		524 50
			1,596 76
	Pants		409 87
	do.		246 50
			655 38
	Vest		160 87
			124 50
			75 50
			360 87
	Hats		141 70
			136 42
			205 17
			48 12
			531 41

195	5 hats	1.00..	5 00
	4	1.00..	4 00
4		1.00..	4 00
4		1.00..	4 00
4		1.00..	4 00
4		7s.	3 50
5		1.00..	5 00
6		1.00..	6 00
11		5s.	7 87
6		1.20..	7 20
2		6s.	1 50
9		1.00..	9 00
6		1.00..	6 00
4		7s.	3 50
10		1.00..	10 00
5		75..	3 75
6		10s.	7 50
4		90..	3 60
6		1.25..	7 50
5		10s.	6 25
12		9s.	13 50
10		5s.	6 25
6		10s.	7 50
			$136 42

196	6 pants	20s.	15 00
	3	18	6 75
4		19 .	9 50
7		18s.	15 75
6		16s.	12 00
1		..	5 00
1		..	5 00

1			2 50
			48 12
			205 17
			136 42
			141 70
	Hats & caps		$531 41

	Pants		409 50
	Coats		1,596 75
	Pants		655 37
	Vests		360 87
	Hats		531 41

12 hats	90..	10 80	
2	6s.	1 50	
2	8s.	2 00	
1	..	2 00	
4	20s.	10 00	
3	20s.	7 50	
2	16s.	4 00	
3	14 .	5 25	
6	3.00..	18 00	
3	19s.	8 12	
2	10s.	2 50	
9	20s.	22 50	
7	14s.	12 25	
2	16s.	4 00	
3	10s.	3 75	
5	2.00..	10 00	
7	2.37..	16 63	
4	16 .	8 00	
1	20s.	2 50	
6	2.00..	12 00	
5	19s.	11 87	
4	10s.	5 00	
20	10s.	25 00	
		$205 17	

4 pants	5 ..	20 00	
2	3.75..	7 50	
5	3.25..	16 25	
6	3.00..	18 00	
2	3.50..	7 00	
1	..	3 25	
1	..	2 50	

	....		5 25
1	....		5 50
1	....		4 50
1	..... 5.50,	5.25..	10 75
3	..... 4.75..		14 25
3	..... 5.25..		15 75
1	....		5 25
7	..... 5.25..		36 75
5	..... 6.25..		31 25
1	....		8 00
6	..... 4.25..		25 50
			231 75
			177 75
		1,065 87	246 50
			409 87
	Pants		1,065 87

1	....		3 25
1	....		2 50
1	....		3 50
3	.....	4.25..	12 75
11	.....	15*s*.	20 62
4	.....	20*s*.	10 00
3	.....	3.25..	9 75
1	....		3 00
1	....		2 25
1	....		3 00
1	....		2 00
6	.....	3.00..	18 00
3	.....	15 .	5 63
5	.....	1.40..	7 00
			$177 75

No. 2. J. D. H.

137 HATS & CAPS.

6 *a*.	.....	1.00..	6 00
8	.....	6*s*.	6 00
4	.....	4*s*.	2 00
9	.....	5*s*.	5 62
10	.....	6*s*.	7 50
6	.....	1.00..	6 00
6	.....	1.00..	6 00
5	.....	9*s*.	5 62
12	.....	90..	10 80
12	.....	87..	10 50
13	.....	66..	8 58
8	.....	90..	7 20
11	.....	7*s*.	9 63
6	.....	7*s*.	5 25
12	.....	6*s*.	9 00
6	.....	1.00..	6 00
6	.....	87..	5 25
12	.....	6*s*.	9 00
6	.....	11*s*.	8 25
12	.....	5*s*.	7 50
			141 70

3 full and 2 half sheets composing complainant's Exhibit No. 2. December 16, 1870.

J. D. HUSBANDS,
U. S. Com.

$870.60.] OCT. 25, 1869.

Six months after date I promise to pay to Macary Brothers, or bearer, eight hundred seventy & $\frac{60}{100}$ dollars, at Coldwater National Bank, value received.

(Erased :) L. SLOWMAN.

(Endorsed :) Complainant's Exhibit No. 1. December 15th, 1870. J. D. Husbands, U. S. com.

(Written across the face :) Paid.

[35 c'ts in. rev. st'mps, cancelled.]

$870.60.] OCTOBER 25, 1869.

Nine months after date I promise to pay to Macary Brothers, or

bearer, eight hundred seventy $\frac{60}{100}$ dollars, at Coldwater National Bank, value received.

(Erased:) L. SLOWMAN.

(Endorsed:) "No. 1. J. D. H."
(Written across the face:) Paid.

[50 c'ts in U. S. stamps, cancelled.]

198 $870.60.] OCT. 25, 1869.

One year after date I promise to pay to Macary Brothers, or bearer, eight hundred & seventy & $\frac{60}{100}$ dollars, at Coldwater National Bank, value received.

(Erased:) L. SLOWMAN.

(Endorsed:) "No. 1, J. D. H."
(Written across the face:) Paid.

[50 c'ts in U. S. st'mps, cancelled.]

Circuit court of the United States for the northern district of New York.
In equity.

HOYT POST, AS ASSIGNEE OF, &C., IN BANKRUPTCY, *vs.* HENRY MICHAELS AND NATHAN LEVI. } Complainant's Exhibits 1 and 2.

NORTHERN DISTRICT OF NEW YORK, *ss:*

I certify that the annexed exhibits, marked respectively Complainant's Exhibits 1 and 2, are all the exhibits produced before me on behalf of said complainant in this suit, on taking testimony before me as U. S. commissioner & special examiner, at Rochester, in said district, on the 12th, 13th, 14th, 15th, and 16th days of December, 1870, and the same are returned as part of the proofs so taken by me.

Dated Rochester, New York, December 16, 1870.

[SEAL.] J. D. HUSBANDS,
U. S. Com. and Sp. Examiner.

(Indorsed:) Circuit court U. S. northern dis. of N. Y. In equity. Hoyt Post, as assignee in b'kr'y of, &c., vs. Henry Michaels and Nathan Levi. Complainant's exhibits and certificate. J. D. Husbands, U. S. com., Rochester, N. Y. Original. Filed June 26, 1872.

199 In consideration of three thousand four hundred eighty-two & $\frac{39}{100}$ dollars, received of Louis Sloman, as follows: Eight hundred & seventy & $\frac{59}{100}$ dollars in cash, and the balance in three notes of eight hundred seventy & $\frac{60}{100}$ dollars each, due in six, nine, and twelve months, we do hereby bargain and sell to the said Louis Sloman a certain stock of gents' furnishing-goods & clothing, as per inventory delivered with this, now in the store occupied by us in Hudson, Michigan.

MACARY BRO'S.

OCT. 25, 1869.

[5-c't rev. st'p, canc.]

(Endorsed:) "A." Defendants' Exhibit A, Dec. 14, 1870.
J. D. HUSBANDS,
U. S. Com., &c.

Macary Bro's, of Hudson, Michigan, (who are my sons,) being desirous of selling their stock of merchandise and goods in said place to Louis Sloman, but the said Louis Sloman being afraid of their creditors, to confirm said sale and his title, and in consideration that he should buy them out, I do hereby acknowledge rec't in full of all demands against the said Macary Brothers to this date.

A. T. MACARY.

OCT. 25, 1869.

[5-c't.r. s., canc.]

Defendants' Exhibit B, Dec. 14, 1870.

J. D. HUSBANDS,
U. S. Com., &c.

200 $100.] HUDSON, *Sept.* 3, 1869.

Thirty days after date we promise to pay to the order of Mowry & Co. one hundred (with interest) dollars, value received, payable at Hudson.

Due Oct. 3rd.

H. S. MACARY.
H. E. MACARY.

(Endorsed:) SEPT. 21st, 1869. Rec'd on the within, $25.
OCT. 15th. Rec'd on the within, $20.

(On end:) Mortgage note.

$100.] HUDSON, *Sept.* 3*d*, 1869.

Sixty days after date we promise to pay to the order of Mowry & Co. one hundred (with interest) dollars, value received, payable at Hudson.

Due Nov. 3rd.

H. S. MACARY.
H. E. MACARY.

(On end:) Mortgage note.

$100.] HUDSON, *Sept.* 3, 1869.

Ninety days after date we promise to pay to the order of Mowry & Co. one hundred dollars, value received, payable at Hudson, with interest.

Due Dec. 3rd.

H. S. MACARY.
H. E. MACARY.

(On end:) Mortgage note.

$100.] HUDSON, *Sept.* 3, 1869.

Four months after date we promise to pay to the order of Mowry & Co. one hundred dollars, value received, payable at Hudson, with interest.

Due Jan. 3rd, 1870.

H. S. MACARY.
H. E. MACARY.

(On end:) Mortgage note.

201 For and in consideration of the sum of three hundred fifty-eight and $\frac{88}{100}$ dollars, to us paid by L. Slowman, we hereby do sell, assign, and set over to the said L. Slowman and his assigns, all our right, title, and interest in a chattle-mortgage, and notes collateral thereto, given to us by H. S. & H. E. Macary, of Hudson, Michigan, bearing date September 3d, 1869, and do hereby constitute the said L. Sloman our attorney in our name, but to his own use and at his own risk and cost, to take all legal measures which may be proper for the complete recovery and enjoyment of the assigned premises.

In testimony whereof we have hereunto set our hands and seal this eleventh day of November, one thousand eight hundred & sixty-nine.

MOWRY & CO.

Executed and delivered in the presence of—
A. A. BOUTELL.

[50-c't rev. st'mp, cancelled.]

Defendants' Exhibit C, Dec. 14, 1870.

J. D. HUSBANDS,
U. S. Com'r.

For value received, we assign all debts owing to us to this date to Louis Sloman.

Hudson, Oct. 27, 1869.

MACARY BROTHERS.

[10-c. int. rev. stamp, cancelled.]

Defendants' Exhibit D, Dec. 14, 1870.

J. D. HUSBANDS,
U. S. Com'r.

HUDSON, MICH., *Oct.* 25, 1869.

I do hereby give permission to Henry S. Macary, of the firm of Macary Brothers, to sell, transfer, or mortgage and sign my name to anything connected with the copartnership business.

H. E. MACARY.

[25-c't st'mp.]

Defendants' Exhibit E, Dec. 16, 1870.

J. D. HUSBANDS,
U. S. Comm'r.

202 Circuit court of the United States for the northern district of New York, in equity.

HOYT POST, AS ASSIGNEE IN B'K'TCY OF, &C., *vs.* HENRY MICHAELS AND NATHAN LEVI. } Defendants' Exhibits A, B, C, D, & E.

NORTHERN DISTRICT OF NEW YORK, *ss:*

I certify that the annexed exhibits, marked respectively A, B, C, D, and E, are all the exhibits produced before me on behalf of the defendants in this suit, on taking testimony before me as U. S. commissioner

and special examiner, at Rochester, in said district, on the 12th, 13th, 14th, 15th, & 16th days of December, 1870, and the same are returned as part of the proofs so taken by me.

Dated Rochester, New York, December 16, 1870.

[SEAL.] J. D. HUSBANDS,
U. S. Commissioner & Special Examiner.

(Indorsed:) Circuit court U. S., nor. dist. of N. Y., in equity. Hoyt Post, as assignee in b'k'tcy of, &c., vs. Henry Michaels and Nathan Levi. Defendants' exhibits and certificate. J. D. Husbands, U. S. com., Rochester, N. Y. (Original.) Filed June 26, 1872.

203 In the district court of the United States for the eastern district of Michigan.

IN THE MATTER OF HARLOW E. MACARY AND HENRY S. MACARY, BANKRUPTS. } In bankruptcy.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Know all men by these presents that Hoyt Post, esq., of the city of Detroit, in the county of Wayne and State of Michigan, in said district, has been duly appointed assignee in said matter.

Now, therefore, I, Hovey K. Clarke, one of the registers in bankruptcy of said court, by virtue of the authority vested in me by the 14th section of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Hoyt Post, assignee as aforesaid, all the estate, real and personal, of the said Harlow E. Macary and Henry S. Macary, bankrupts aforesaid, including all
204 the property of whatever kind of which they were possessed or in which they were interested or entitled to have on the nineteenth day of November, A. D. 1869, with all their deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act:

To have and to hold all the foregoing premises to the said Hoyt Post and his heirs forever; in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register, have hereunto set my hand and caused the seal of said court to be affixed this thirteenth day of January, A. D. 1870.

[SEAL OF SAID COURT.] (Sig.) HOVEY K. CLARKE,
Register in Bankruptcy.

205 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, D. J. Davison, clerk of the district court of the United States for said district, do hereby certify the within and foregoing to be a true copy of the original assignment of bankrupts' effects in the matter herein entitled, on file and of record in my office; that, having carefully compared the same with said original, I find it to be a true transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Detroit, in said district, on this seventeenth day

of June, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth.

[L. S.] D. J. DAVISON, *Clerk.*

206 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, John W. Longyear, judge of the district court of the United States in said district, do hereby certify that Darius J. Davison, who signed the foregoing certificate, is clerk of the said court, and that his signature thereto is genuine, and that the seal thereto affixed is the seal of said court.

June 7th, 1872.

JOHN W. LONGYEAR,
U. S. Dist. Judge, E. Dist. Mich.

(Indorsed:) No. 391. In the district court of the United States for the eastern district of Michigan. In the matter of Harlow E. Macary & Henry S. Macary, bankrupts. Cert. copy. Assignment of bankrupts' effects.

207 U. S. circuit court, northern district of N. Y.

HOYT POST, ASSIGNEE, &C.,
vs.
MICHAELS & LEVI.

It is admitted on the argument of this case that in the bankruptcy proceedings referred to in this case, the following creditors and no others proved their claims against the firm of bankrupts or against either of them; and also that the amounts hereunder stated are the correct amounts so proved; and the nature or consideration of the debts hereunder stated are correct as the same were proved, namely:

Against the firm:

To B. Schermerhorn, of Hudson, for printing	$93 48
Miller & Co., of Syracuse, for cigars	58 75
A. Judson, of Chicago, for mittens & gloves	84 50
Northrup & Richards, of Broadalbin, N. Y., for gloves	36 00
Chas. B. Northrup, of Detroit, for furnishing-goods	31 35
A. S. Macary, of Coldwater, money loaned	2,242,70

Against H. S. Macary:

Miller & Co., Syracuse, for cigars	$57 50
Wolf & Co., Dayton, Ohio, " "	42 50
Mowry & Co., Detroit, " "	49 50

HOYT POST,
Complainant in Person.
J. N. POMEROY,
Counsel for Def'ts.

208 (Endorsed:) Post, assignee, vs. Michaels & Levi. Stipulation. Filed June 26, 1872.

209 The circuit court of the U. S., northern district of New York.

HOYT POST, ASSIGNEE, &c.,
vs.
HENRY MICHAELS AND NATHAN LEVI.

On the hearing of this action it is stipulated in open court by the complainant in person, who argues the cause on his own behalf, and Mr. J. N. Pomeroy, who argues on behalf of the defendants, as follows: The said Henry S. Macary and Harlow E. Macary, named in the pleadings and proofs, were adjudicated bankrupts on the first day of December, A. D. 1869, by the district court of the United States for the eastern district of Michigan, upon the creditor petition of the said A. T. Macary, also mentioned in the pleadings and proofs. Such adjudication was made in the ordinary manner upon default. Such proceedings were thereafter had that the complainant was on the eighth day of
210 January, 1870, appointed assignee of said Henry S. and Harlow E. Macary, and that he duly qualified as such, and entered upon the performance of the duties of said trust; that on the thirteenth day of January, eighteen hundred and seventy, Hon. Hovey K. Clarke, register in bankruptcy, to whom said bankrupt proceedings were referred, executed and delivered to the complainant an assignment in due form of all the estate and effects of said bankrupts, a copy of which, duly certified, is produced on the hearing, to be read as evidence on said hearing, and filed in said cause; that debts have been proved before said register against said bankrupts as follows, viz:

Against the firm:

F. B. Schermerhorn, of Hudson, for printing	$93 48
Miller & Co., Syracuse, cigars	58 75
A. Judson, Chicago, mittens & gloves	84 50
Northrup & Richards, Bro'dalbin, N. Y., gloves	36 00
Charles B. Northrup, Detroit, furnishing-goods	31 35

Against Henry S. Macary:

Miller & Co., Syracuse, cigars	$37 50
Wolf & Co., Dayton, "	42 50
Mowry and Co., "	49 50

211 On the hearing the complainant produces the schedule of property and of liabilities, filed in said bankruptcy proceedings by the said Henry S. Macary and Harlow E. Macary. Said schedules bear date the fifteenth day of February, A. D. 1870, and were filed on the eighteenth day of February, A. D. 1870.

As said schedules are voluminous, and for the purpose of diminishing the amount of unnecessary documents, it is agreed that the following is a correct statement and list taken from said schedules of all the creditors of said Henry S. and Harlow E., with their residences and the amounts of their claims and the nature of their claims, copied accurately from said schedules; and also of the individual creditors of both the said Henry S. and Harlow E. respectively, with like statements as to their residences and the nature and amounts of their respective claims; and it is further agreed that this statement and stipulation may stand and be used on the hearing hereof in place of said original schedule.

212

213 *Schedule of the indebtedness of the firm.*

SCHEDULE A, (1.)

Names of creditors.	Residence & occupation.	Amount.	Where & when contracted.	Nature & consideration of the debt, &c.
Township of Hudson, Lenawee Co.	Hudson, Michigan.....	$29 40	Taxes for 1869 on stock of goods, clothing, &c.	Copartnership, Macary Brothers.

SCHEDULE A, (2.)

Name of creditors.	Residence & description.	When and where contracted.	Value of securities.	Amount of debts.
Mowery & Co.....	Detroit, Mich. Consideration, goods purchased in course of trade. Nature of security, chattel-mortgage on stock of clothing, tobacco, & cigars.	Hudson, Mich. Date of mortgage, Sept. 3d, 1869.	$355 00	$355 00

SCHEDULE A, (3.)

Names of creditors.	Residence & occupation.	Amount.	When & where contracted.	Nature and consideration of the debts, &c.
Sloman & Rosenthal	Rochester, N. Y.; wholesale dealers in youths' clothing.	$344 16	Rochester, N. Y.. April 6th, 1869..	Goods purchased, claim stands in account.
A. Judson	Chicago, Ill., merchant	84 50	Hudson, Mich., Oct. 1, '69	Goods purchased; account.
Potter & Smith	Boston, Mass., "	7 50	" Sep. 5, '69	" " "
Bier & Stern	Rochester, N. Y., "	415 74	Rochester, N. Y., Sep. 24, '69	" " open account.
C. B. Northrop	Detroit, Mich., "	31 35	Hudson, Mich., Oct. 5, '69	" " " "
Northrop & Richards	" " "	36 00	" " "	" " " "
John Saby, jr., & Co	Rochester, N. Y., "	368 75	Rochester, N. Y., Sep. 15, '69	" " " "
A. A. Finney	Hudson, Mich., boots & shoes	4 00	Hudson, Mich	Balance of open account.
Boise, Rude & Co	" " bankers	47 28	" "	Bal. overdrawn of bank acc't.
Beardsell & Plimpton	" " groceries	12 45	" "	Balance of open account.
D. Brown	" " "	3 71	" "	" " "
W. F. B. Schermerhorn	" " printer	93 48	" "	Open account.
A. T. Macary	Coldwater, Mich., machinist	2, 200 00	Coldwater, " Aug. 11, '68	Cash borrowed.
Chapman & Small	Hudson, Mich., physicians	39 95	Hudson, "	Medical services.
George Chapman	" " "	23 57	" "	" "
J. Pratt, B. G. Tayer, & G. Chapman	" "	100 00	" " Oct., 1869	Sureties to promissory note, & note paid by them.
Ladd & Penfield	Hudson, " printers	Unknown	" " 1868 & 1869	Printing acc't, unsettled.
Geo. Lyon	" " drayman	6 90	" " 1869	Drawing " "
Henry Kellogg	" " liveryman	3 40	" " 1869	Livery " "

214 SCHEDULE A, (4.)

Nothing under this head.

SCHEDULE A, (5.)

Nothing under this head.

Schedules of indebtedness of Harlow E. Macary.

SCHEDULE A, (1.)

Not any under this head.

SCHEDULE A, (2.)

None under this head.

SCHEDULE A, (3.)

Names of creditors.	Residence & occupation.	Amount.	When & where contracted.	Nature & consideration of the debt, &c.
Blodggett & Brown.	Coldwater, Michigan.....	$10 00	Coldwater, Mich., 1868.	Balance of acc't on bill of furniture.

SCHEDULE A, (4.)

None under this head.

SCHEDULE A, (5.)

None under this head.

215 *Schedules of the indebtedness of Henry S. Macary.*

SCHEDULE A, (1.)

None.

SCHEDULE A, (2.)

No individual debts secured in any manner.

SCHEDULE A, (3.)

Names of creditors.	Residence & occupation.	Amount.	When & where contracted.	Nature & consideration of the debt, &c.
Miller & Howell....	Syracuse, N.Y., tobbacconists.	$96 20	Hudson, Mich., July 26, Aug. 17, & Oct. 14, 1869.	For goods purchased, standing in account.
John J. Bagley & Co.	Detroit, Mich., "	48 60	Hudson, Mich., Sept. 24 & Oct. 7, 1869.	Goods purchased, note given.
J. P. Wolf.....	Dayton, Ohio, "	42 50	Hudson, Mich., Sept. 25, 1869.	Goods purchased, standing in acc't.
Wither, Nash & Co..	Toledo, Ohio, "	8 25	Hudson, Mich., Oct. 4, 1869.	Goods purchased in account.
Mowry & Co.....	Detroit,	44 20	Hudson, Mich., Sept. 20 & Oct. 5, 1869.	" " "

SCHEDULE A, (4.)

Nothing under this head.

216 SCHEDULE A, (5.)

No accommodation paper.

HOYT POST,
Complainant.
JOHN NORTON PERRY,
Counsel for Defendant.

217 In the district court of the United States for the eastern district of Michigan.

IN THE MATTER OF HARLOW E. MACARY & HENRY S. MACARY, BANKRUPTS. } In bankruptcy.

At Detroit, in said district, on the sixteenth day of June, A. D. 1870, before Mr. Hovey R. Clarke, register in bankruptcy.

EASTERN DISTRICT OF MICHIGAN, *ss:*

HENRY MICHAELS, of Rochester, county of Monroe, State of New York, being called by Hoyt Post, assignee of the above-named bankrupts' estate, sworn and examined upon interrogatories propounded to him as follows, to wit:

(Mr. D. B. Duffield, who appears for the witness, objects.

Mr. DUFFIELD. I object that from the allegations in the petition filed the answers the witness may give may tend to affect his right to prove his claim.)

Ques. You are one of the firm of Michaels & Levi, of Rochester, New York?

Ans. Yes, sir.

218 Ques. Are you acquainted with these bankrupts, H. and Henry S. Macary?

Ans. Yes, sir.

Q. Were they indebted to the firm of Michaels & Levi?

Ans. Yes, sir.

Q. How much?

Ans. I can't tell the exact amount; between four and five thousand dollars.

Q. How long had that indebtedness lasted?

Ans. No regular time, because they bought and paid and paid and bought.

Q. When did you commence trading with them?

Ans. About a year and a half or fifteen months before. I think in August, 1868.

Q. Did they owe you all the time, more or less?

Ans. Yes, sir; more or less.

Q. About how much?

Ans. I can't tell you.

Q. When did it first amount to $4,000 or $5,000?

Ans. That I can't tell you.

Q. When did you see the bankrupts last?

Ans. I think it was some time in October.

Q. October 25th?

Ans. I can't tell you exactly.

Q. At the time you saw them did they make a disposition of their property?

219 Ans. Yes, sir; at the time I saw them they sold their property.

Q. That was the last time you saw them?

Ans. Yes, sir.

Q. Who did they sell to?

Ans. To L. Sloman, of Coldwater.

Q. When did you first see them on that visit, or were you there more than one day?

Ans. Yes, sir.

Q. How many days?

Ans. I think two or three. I can't tell exactly.

Q. Did you have any conversation with the bankrupts at that time?

Ans. I did.

Q. State what the nature of that conversation was.

Ans. I went into the store, saw one of the Macarys, and asked him the reason why he had not sent us some money.

Q. Which one of the Macarys?

Ans. I think Henry. I asked him why he hadn't sent us some money. He said business was bad, and he hadn't been able to send any. Says I, (this is just as near as I can recollect it, because I have left my memorandum at home containing all the particulars, and I didn't expect to be put on this examination,)—says I, "Your stock looks in a bad shape. Have you any objection to take an account of stock?" He said

220 no, he had no objection. We took an account of the stock. The stock footed up about the amount at the first cost of the goods—footed up the amount they owed our house.

Q. What do you mean by first cost?

Ans. What they paid for the goods, not at the value of the stock. Stock depreciates in the store after a time.

Q. New York cost?

Ans. Yes, sir. I asked him then what they owed. He told me they were indebted to their father, to Bier and Stern, and John Saby, j'r, & Co., to Sloman & Rosenthal. The amount of indebtedness to these three parties, I think, was about $1,200.00, $1,400.00, besides the father's. The aggregate (that is my impression) may be a few hundred dollars more or less. I told him—says I, "You have got here about between four and five thousand dollars to pay $8,000 with. What do you propose to do?" He said he didn't know. Says I, "On Monday I shall remain here and throw you into bankruptcy if it is not paid." He cried hard about that. He didn't want to be thrown into bankruptcy.

Q. What day was this—Saturday?

A. I think it was. I told him he owed us that large amount of money, and was owing to other parties. He said if he was thrown into

221 bankruptcy, or rather he said the goods would not realize to the creditors 10c. on the dollar if they were to be thrown into bankruptcy, and they would be without their name. I told him there was only one way to prevent me from throwing him into bankruptcy, and that was, says I, "I will give you a receipt in full of all demands against you, so far as our house was concerned; also a receipt in full for his creditors, because he only told me that he had Bier & Stern, Sloman & Rosenthal, and John Saby, j'r, & Co., and that is the only creditors he told me of; and I told him, as to his father, I would guarantee to give

him a receipt, provided his father would give him a receipt in full of all demands.

Q. By Mr. DUFFIELD. That would cover the whole of the creditors?

Ans. Yes, sir; that would cover the whole of the creditors. He said he would think over it. He thought the mattter over, and telegraphed immediately to his father.

Q. What took place between him and his father?

A. I don't know. At all events, next time I saw him, on the same day, he told me his father had agreed to it; and his father gave him a receipt in full of all demands against him, and I gave him a receipt in full of all demands against him, and also a written consent to

222 Sloman to purchase the stock of goods.

Q. Is that all took place?

Ans. Yes, sir.

Q. What day was that?

Ans. I think that was on Monday.

Q. What was done that day?

Ans. The sale was made to Louis Sloman. I think it was.

Q. At what price?

Ans. 75c. on the dollar.

Q. The cost price of the goods?

Ans. Yes, sir.

Q. Do you remember what it amounted to?

Ans. I can't tell you exactly.

Q. How did Sloman pay for it?

Ans. Part in cash, and the balance in notes.

Q. Do you remember what amount in cash?

Ans. I can't tell.

Q. What amount in notes?

Ans. I can't tell. It is so long ago it has really escaped my memory.

Q. What was done with those notes and that money?

Ans. Those notes were given over to me, and that money was given over to me.

Q. By whom?

Ans. By the Macarys.

Q. And what did you do?

223 Ans. Gave him a receipt in full of all demands.

Q. Signed by whom?

Ans. By our house.

Q. Look at this paper, Exhibit "B," attached to the deposition of Adam T. Macary, filed in the bankruptcy proceedings in this case, and say whether that is the receipt.

Ans. I think it is.

Q. Did you sign the name of Michaels & Levi to that receipt?

Ans. That is my signature.

Q. Was that the day the transaction was had?

Ans. I think it was.

Q. October 25th, 1869?

Ans. Yes, sir.

Q. Was *that* the price named in that receipt the price paid?

Ans. I should judge it was.

Q. Is that the price Sloman paid for the goods?

Ans. I think so.

Q. And the cash he paid was $870.59, and the notes—three notes of $870.60 each?

Ans. Yes, sir.

Q. Amounting in all to $3,482.39?
Ans. Yes, sir; $3,482.39.
Q. That day you think was the day of the sale to Sloman?
Ans. I think so. I can't tell.
224 Q. You received all the proceeds of that sale, did you not
Ans. Yes, sir; for the benefit of the creditors East.
Q. Who was Sloman?
Ans. A merchant doing business in Coldwater.
Q. Your brother-in-law?
Ans. Yes, sir.
Q. Did he marry your sister or you marry his?
Ans. I married his.
Q. You took an inventory of the entire Macary stock?
Ans. Yes, sir; at least Macary and myself. Macary called the goods over, and somebody else put them down, I think.
Q. Did you make out the price?
Ans. Yes, sir.
Q. Was it the wholesale price?
Ans. Yes, sir.
Q. Do you know whether Macary Brothers knew anything about Sloman before that day?
Ans. I don't know. I suppose they knew him.
Q. Who suggested Sloman as purchaser?
Ans. I don't know.
Q. Did you?
Ans. I don't know whether I did or not.
Q. What do you think?
Ans. I can't tell. I am under the impression it was suggested by them, but I can't tell.
225 Q. You say you told them on Monday unless it was fixed up?
Ans. Yes, sir.
Q. Then you say they agreed to see their father, and then told you their father was willing; what day was that? State whether that was Monday.
Ans. I can't tell; it is impossible for me to tell.
Q. When was Mr. Sloman sent for?
Ans. He wasn't sent for at all.
Q. He wasn't there at all?
Ans. No, sir.
Q. How did you get Sloman's notes?
Ans. Went to Coldwater.
Q. Who went?
Ans. Macary and myself. Henry Macary.
Q. The last transaction was with Henry Macary?
Ans. Yes, sir.
Q. Was the old gentleman present at any time?
Ans. He was present when the sale was made.
Q. Was he present when the sale was closed up and the notes given?
Ans. Yes, sir.
Q. How did you do this—was a bill of sale made?
Ans. Yes, sir.
Q. When was that executed—before you went to Coldwater or not?
Ans. At Coldwater I think it was.
Q. The old gentleman didn't go to Coldwater?
Ans. He lived there in Coldwater.
226 Q. Was he there when it was made?

Ans. He was.

Q. At the time of the interview between you and Sloman and Henry, was he there?

Ans. Yes, sir.

Q. Then the papers were all delivered and the notes and money paid there at Coldwater?

Ans. Yes, sir.

Q. When you took that inventory did you say anything to Macary Brothers about their selling these goods to Michael & Levi, or to yourself?

Ans. Never, sir.

Q. Did you say anything to them about your purchasing them in that way, and allowing them to sell at any price they liked above the price which you marked on the inventory, and that they were to have all over that for their commission for the sale?

Ans. No, sir.

Q. And did you agree to furnish them goods to sell on commission so as to keep their trade along?

Ans. No, sir.

Q. These notes you took were payable in six, nine, and twelve months, were they?

Ans. Yes, sir.

227 Q. Did you while there remark, in the presence of Adam T. Macary and Henry S., while this transaction was going on, and in the presence of Louis Sloman, that the firm of Macary Brothers were owing your firm somewhere between $4,000 and $5,000?

Ans. When; after the sale was made?

Q. And that it was necessary that the Macary Brothers should sell the goods to you through a third party?

Ans. No, sir.

Q. That it was necessary, in order to have the thing look all right, that the goods should be taken in the name of a third party?

Ans. Emphatically, no, sir.

Q. You don't remember who suggested the name of Sloman as purchaser?

Ans. I am under the impression it came from Henry Macary.

Q. Do you know whether he was acquainted with Sloman?

Ans. Yes, sir; I think he lived there—not at that time, but he was acquainted with Louis Sloman. One of the Macarys lived there and was a clerk for Sloman.

Q. Did you make any inquiries of the Macary Brothers whether they had any other property?

Ans. Yes; I asked them.

Q. What did they say?

Ans. They said they had none.

228 Q. Did you know at that time of any indebtedness to Mowry & Co., of Detroit?

A. I didn't.

Q. Did you know Mowry & Co. had a chattel-mortgage on their stock?

Ans. I did not.

Q. Did you make any inquiries about mortgages?

Ans. No, sir; I didn't. I heard it some time after, but not at that time; never knew a word about it.

Q. Have any of these notes yet become due?

Ans. I think they have.

Q. One of them has?

Ans. Yes, sir.

Q. Has it been paid?

Ans. I should judge so, but I am not financier of the house. I suppose it has been paid.

Q. Sloman is entirely responsible?

Ans. Yes, sir; perfectly responsible for any amount.

Q. Did you know whether there was anything due for tax on those goods?

Ans. I did not.

Q. Did you at that time?

Ans. Never knew.

Q. You did not know at that time they owed Mowry & Co., of Detroit?

Ans. No, sir.

Q. You didn't examine yourself?

229 I asked them distinctly if they owed anybody else, and they told me distinctly not one dollar's worth, except to the parties they gave me.

Q. Did you inquire about mortgages?

Ans. I didn't.

Q. Had you had any information that there was a mortgage?

Ans. Not any at all.

Q. I will read over this indebtedness. You say those you knew were Sloman & Rosenthal, Bier & Stein, and John Saby, j'r, & Co.?

Ans. And the old man Macary—that is all I know of.

Q. Those three firms I mentioned were all Rochester firms, were they not?

Ans. Yes, sir.

Q. You understood the amount of these claims was about twelve or thirteen hundred dollars?

Ans. I think so—I can't tell exactly—$1,100 or $1,200.

Q. You didn't take all these goods and money for the full amount of your claim?

A. Oh, no, sir.

Q. How much more than the $3,480 did they owe you?

A. Between four and five thousand in all.

Q. How long had they owed that amount?

Ans. I can't tell exactly; right along from a year before.

230 Q. How long had it been as large as that?

Ans. Not over a month, or two months, I suppose.

Q. About how much of it became due at that time?

Ans. If I average the whole thing, it was more than due; past due—all past due.

Q. Then there was a portion of this account wasn't due without averaging?

Ans. All the goods we sold him were due at any moment.

Q. What do you mean by averaging it?

Ans. Everything we sold was due at any moment.

Q. What do you mean by averaging it?

Ans. I can't tell exactly, but everything we sold was due at any moment.

Q. The last bill was sold a month or two prior to this?

A. I think two months prior.

Q. When they purchased that bill of you, did they make any statement to you of their affairs?

Ans. I don't think they did.

Q. Did you go from Rochester out there on purpose to see these parties?

Ans. No, sir.

Q. Took them on your way?

Ans. Yes, sir; I have to look up a good many lame ducks like them.

231 Q. You knew they were lame ducks, did you, before you started?

Ans. No, sir. I went in with the intention of seeing them; didn't know whether they were good, bad, or indifferent, supposed they were good.

Q. These prices they put upon these goods at the time you saw this inventory was rather more than the full price, was it not—the price as it was carried out in the inventory was rather more than the value of the goods at the time?

Ans. Macary called over the goods, and naturally gave the prices whatever they were.

Q. Did you examine the goods and see what they were?

A. I didn't care what the goods were; paying seventy-five cents on the goods is a first-rate good sale.

Q. You think this $3,400 which Sloman paid was full value for the goods?

Ans. Yes, sir.

Q. And that was all the goods he had?

Ans. All he represented he had.

Q. You say you didn't propose to buy them out and leave the stock in the store?

A. No, sir.

Q. No such talk between you at all?

A. No, sir; it is not reasonable, either.

Q. No talk of your furnishing them goods and permitting them

232 to sell in that way on commission?

Ans. No, sir; I didn't do that kind of business.

Q. What was the agreement with reference to Sloman's taking possession of the goods?

A. I don't know what agreement Sloman made with him.

Q. Wasn't you present?

A. No, sir.

Q. Wasn't you present when the papers passed?

A. Yes, sir.

Q. When was Sloman to take possession?

A. Immediately.

Q. Did he take possession immediately?

A. I don't know. I went off the same night.

Q. Did you go off West?

A. No; I went East.

Q. Sloman hadn't left Coldwater, when you were there, had he?

A. I can't say positive whether he went with me from Coldwater, to go to Hudson, or whether he informed me after he left next day.

Q. Did you get the fact any time about when he was to take possession?

A. No, sir.

Q. How were those goods made payable—to your order or Macary Brothers?

A. I can't tell.

Q. Did Macary Brothers endorse the note?

233 A. No, sir; that I do know.

Q. You don't know whether the notes were made payable to bearer or order?

A. No, sir.

Q. Did this money get into Macary Brothers' hands at all?

A. Yes, sir.

Q. Were you all three present at the time the transactions took place and the money paid into their hands, and then right over to you?

Ans. Yes, sir.

Q. You say you agreed to give them a receipt in full for the other creditors?

A. I did.

Q. Did you do it?

A. I have got it—yes, sir.

Q. You have got it?

A. I have got it.

Q. Did you pay the other creditors anything?

A. Yes, sir; something.

Q. What amounts?

A. Their proportion.

Q. Of what?

A. Of the receipts of that sale.

Q. How did you arrive at it?

A. Divided it off—whatever was received, we paid them their equal proportion.

Q. You mean all these three Rochester creditors you named?

234 A. Yes, sir.

Q. Did you pay Macary anything?

A. I had nothing to pay him; he was no creditor.

Q. Did you pay Macary anything?

A. I didn't.

Q. You say Adam T. Macary made out and signed a receipt in full then and there?

A. Yes, sir.

Q. It was handed to the young men?

A. Yes, sir.

Q. You don't know, I suppose, what has been done with reference to these goods since?

A. Oh, no.

Q. Don't know, except by hearsay?

A. No, sir; not of my own knowledge.

Q. Was anybody else present during these negotiations between you and Henry S. Macary on behalf of the Macary Brothers?

A. An attorney.

Q. Who?

A. Mr. Shipman.

Q. Whose attorney?

A. Attorney for both Sloman and Macary.

Q. Where was this—at Coldwater?

A. Yes, sir.

Q. Was he present at your interview at Hudson?

A. No, sir.

Q. Was Bean?

235 A. I don't know of anybody being present.

Q. Besides Henry S. Macary & Adam T.?

A. Adam T. wasn't at Hudson at all.
Q. Was Harlow E. there at all?
A. Yes, sir; but he was sick.
Q. Was he present during any of your conversations?
A. I think not.

Cross-examined by Mr. D. B. Duffield, who appears on behalf of the witness:

Q. Did you see this discharge or release, or whatever it was, of Adam T. Macary to his sons?
A. Yes, sir.
Q. See it delivered?
A. Yes, sir.
Q. Over to whom?
A. Over to Henry S.
Q. Was there anything said at that time about the validity of his claim, whether it was a bona-fide claim or not?
A. No, sir. I always supposed he got his money; it was my impression.
Q. What money?
A. That he claimed.
Q. You obtained from the other Rochester creditors these discharges?
A. Yes, sir. I carried out my contract to the letter.
236 Q. Was there any objection made at that time by Adam Macary to this proceeding at all?
A. Not a particle. He was in favor of it.
Q. Did he give his assent to it?
A. Yes, sir; gave his written signature to Louis Sloman.
Q. Did he have anything to say to you in the way of dissuading you from throwing them into bankruptcy, in addition to what they said?
A. He told me that was the best course to pursue; better than throwing them into bankruptcy.
Q. Adam said?
A. Yes, sir.
Q. You went through the stock there with the inventory; what is your judgment of the value of that at auction sale?
A. It would not realize fifty cents on the dollar, nor forty cents.
Q. Do you remember the amount of the inventory?
A. It was between four and five thousand dollars. That will tell you the amount, seventy-five cents on the dollar.
Q. Did you ever hear of Adam Macary protesting against this arrangement afterward?
A. No, sir.
Q. Did you ever hear of either of these parties, the sons, protesting against it?
A. No, sir.
Q. When had you any idea or knowledge of any protesting against that arrangement?
237 A. When I received a letter from Sloman that Macary refused to give possession, was the first intimation I had of it. Sloman replevined the stock and gained the suit.
Q. Took possession?
A. Held possession and gained the suit.
Q. Has held the stock and gone on with the business since?
A. Yes, sir; moved the stock out of the store to his own place of business.

Q. Do you know whether they represented they had any assets than this stock?

A. I don't know that they did.

Q. Did you not enquire?

A. I enquired, and they said no.

Q. In the way of book-accounts?

A. I asked them, and they said they had not.

Q. Were you particular to obtain from them a full statement of their entire indebtedness?

A. No.

Q. Did you ask them?

A. I did, and they seemed reluctant to answer, and I didn't press the question.

Q. What was your impression as to whether this was a statement of their entire indebtedness or not?

A. My impression was they either had more money or they had paid their father; that was my impression, and I am of that
238 impression to-day. The facts show the case to be they had other assets.

Q. I was not talking about assets; I was asking you whether you had any reason to suppose they had any other creditors than those named, the father and these.

A. No, sir. I had no reason to suppose they had another creditor. I asked them, and they told me those were all the creditors they had.

Q. Was that in the presence of the father, anything like that?

A. No, sir; in his store at Hudson.

Q. From their statements then made to you, you supposed that this arrangement provided for all their creditors?

A. Yes, sir.

Q. You acted for the Rochester creditors, and the old gentleman Macary for himself?

A. Yes, sir.

Q. Can you state accurately or approximately the balance that remained due to you from them, or to your house, after crediting them with your proportion of these assets?

A. Probably two thousand dollars.

Q. (By Mr. Post.) Did you ever tender those receipts of the other parties, Rosenthal, Saby, j'r, & Co., to the bankrupts?

A. No, sir.

239 Q. Did you get them?

A. Yes, sir.

Q. Before the bankruptcy proceedings?

A. I can't tell that.

Q. When did you get them?

A. After I returned—soon after.

Q. When did you return?

A. Some week or two afterward. I was on a regular journey.

Q. When you got them did you send them on to Macary Brothers?

A. No, sir; I hold them now.

Q. Had you then heard anything about the difficulty?

A. When I got home I heard they had refused to give up the stock, and intended to throw the thing into bankruptcy.

Q. You had then got a letter from Mr. Sloman to that effect?

A. Yes, sir.

Q. Do you remember when it was dated?

A. No, sir.

Q. Was it written a week after?
A. No, sir.
Q. How long after?
A. May be 10 days.
Q. It was within ten days, then?
A. Yes, sir; probably that.
Q. What is your business?
240 A. Wholesale clothing-house.
Q. What was Macary Brothers' business?
A. Retail clothing.
Q. What was Sloman's business?
A. Retail clothing-house.
Q. Did Sloman examine these goods at Hudson at all before he bought?
A. He was up there. I don't know whether he examined them at that time; not at that time.
Q. How long were you there before this trade was made with Sloman?
A. I was on my way.
Q. How long were you at Coldwater with Macary and Sloman before this trade was made? How long was the negotiation lasting for the sale?
A. Three or four hours. Two or three hours, it may have been. I can't tell exactly.
Q. How long had Macary Brothers been in business; do you know?
A. About fifteen or eighteen months.
Q. About the time they first commenced they commenced trading with you?
A. Yes, sir; and I wish I had never seen them.
Q. (By Mr. Duffield.) Were those receipts from those other creditors demanded from you by Macary?
241 A. No, sir; never demanded.

JUNE 17TH.—Examination resumed by Mr. Post:

Q. I ask you the question whether, at the time you were there, Macary didn't tell you the amount of his indebtedness to his father?
A. Yes, sir.
Q. What was it?
A. $2,200.
Q. Who furnished this money to Sloman that purchased these goods; whether you furnished it?
A. No, sir.
Q. You don't know where it came from?
A. I have no knowledge. He gave me the money—gave it to Macary, rather—and he paid it to me. I saw him give it to Macary.
Q. About this mortgage of Mowry & Co., I think you stated at the time of this transaction you didn't know of the circumstance of the mortgage.
A. No, sir; I didn't.
Q. You knew it afterwards?
A. Some time afterward I was informed, not of my own knowledge.
Q. You heard of it from Sloman?
A. From information. I can't tell how it was. I think it was
242 from Sloman.
Q. Do you know whether Sloman knew of the circumstances of the mortgage at the time of the sale?
A. I don't think he did; otherwise he would have told me.

Q. Did you know whether the mortgage was paid before the sale was made?

A. I didn't know there was any mortgage on it.

Q. Do you know now?

A. No; I didn't know anything about any payment on it of my knowledge.

By Mr. Post:

Q. How long were you at Coldwater at the time the sale was made to Sloman?

A. I think from twelve o'clock in the day till one next morning.

Q. So you got there at twelve o'clock noon, and left at one o'clock in the night?

A. Yes, sir.

Q. How long after you got there before the trade was made?

A. Two or three hours.

Q. You knew that Sloman had never seen these goods at that time?

A. No, sir; I didn't know anything of the kind. He was there two or three weeks before.

243 Q. You knew that Sloman didn't come down at that time to take possession, did you not?

A. I don't know.

Q. When were you first advised of the replevin suit, by which Sloman got possession?

A. I think you have it in the statement.

Q. Were you not advised before the replevin suit commenced?

A. I think not.

Q. Did you not yourself employ the attorneys that commenced that replevin suit?

A. No, sir.

Q. In that letter you got from Sloman when you returned to New York, did he say anything about the replevin suit?

A. I can't now call it to mind; it ain't possible for me to remember.

Q. In the testimony you have stated that one of the Macarys lived at Coldwater, and clerked for Sloman; you don't mean that that was at the time the sale was made?

A. No, sir.

Q. State when it was.

A. That was some two years or more before.

(Signed) HENRY MICHAELS.

244 Read to the deponent by me, subscribed by him in my presence and sworn to by him before me this (17th) seventeenth day of June, A. D. 1870.

(Signed) HOVEY R. CLARKE,
Register in Bankruptcy.

245

246 (Endorsed.) U. S. circuit court. Hoyt Post, assignee, vs. Henry Michaels & Nathan Levi. Examination of Henry Michaels. Deposition on part of defendants furnished to the court by J. N. Pomeroy, counsel for defendant.—Filed June 26, 1872.

247 To the Hon. Ross Wilkins, judge of the district court of the United States for the eastern district of Michigan:

The petition of Adam T. Macary, of the city of Coldwater, in the coun-

ty of Branch and State of Michigan, respectfully shows, that he is a creditor of Harlow E. Macary & Henry S. Macary, copartners in business under & by the name, style, and firm of Macary Brothers, who for a period of twelve months next preceeding the date of the filing of this petition have resided at the village of Hudson, in the county of Lenawee, and State of Michigan, and district aforesaid; that your petitioner's demand is provable against the said Harlow E. Macary and Henry S. Macary, copartners as aforesaid, in accordance with the provision of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867; that he believes that said Harlow E. Macary and Henry S. Macary, copartners as aforesaid, owe debts to an amount exceeding the sum of three hundred dollars; that your petitioner's demand exceeds
248 the sum of two hundred and fifty dollars, and that the nature of your petitioners' demand against the said Harlow E. Macary and Henry S. Macary is as follows: The sum of twenty-five hundred dollars for borrowed money handed by your petitioners to the said Harlow E. Macary and Henery S. Macary on the fourth*t*eenth day of August, eighteen hundred and sixty-eight, (1868,) and payable in one year from that date, with interest at ten per cent. per annum, payable semi-annually, upon which demand three hundred dollars of the principal and all the interest up to August 14th, 1869, has been paid, leaving still due to your petitioner the sum of twenty two hundred dollars of said principal, and the interest thereon since August 14th, 1869, being fifty-one dollars and ninety-four cents, which, with said unpaid principal sum, now amounts to two thousand & two hundred & fifty-one dollars & 94 cents still due & owing from said Harlow E. Macary & Henry S. Macary, copartners as aforesaid, to your petitioner at the date of this petition. And your petitioner further represents that within six calendar months next preceeding the date of this
249 petition the said Harlon E. Macary and Henry S. Macary did commit an act of bankruptcy within the meaning of said act, to wit, in that they, the said Harlon E. Macary and Henry S. Macary, within the period aforesaid, to wit, at the village of Hudson, in the said dist., on the third day of September, A. D. 1869, being possessed of a certain estate, property rights, and credits, to wit, a stock of merchandise situated in the village of Hudson aforesaid, and being insolvent, did make a transfer and conveyance of the same to Mowry & Co., a copartnership or firm of individuals doing business at the city of Detroit, in the State of Michigan—the names of the individual members of said firm is to your petitioner unknown—with intent to delay and hinder the creditors of them, the said Harlon E. Macary & Henry S. Macary, copartners as aforesaid. And your petitioner further represents that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period of six calendar months next preceding the date of this petition, did commit an act of bankruptcy within the meaning of said act, to wit, in that they, the said Harlon E.
250 Macary & Henry S. M'cary, copartners aforesaid, within the period aforesaid, and in said district, towns, on the third day of September, A. D. 1869, being possessed of the stock of merchandise aforesaid, and being insolvent, did make & execute a conveyance of said merchandise by way of a chattel-mortgage to Mowry & Co., a firm or copartnership of persons doing business in the city of Detroit, in the county of Wayne, in the State of Michigan, and in said district—but the individual names of the persons composing said firm are unknown to your petitioner—with intent to give a preference to said

Mowry & Co., they being creditors of said Harlon E. M'cary & Henry S. Macary.

And your petitioner further represents that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period of six calendar months next preceeding the date of this petition, did commit an act of bankruptcy, within the meaning of said act, to wit, in that the said Harlow E. Macary and Henry S. Macary, as copartners as aforesaid, within the period aforesaid, and within said district, to wit, on the third day of Sept., A. D. 1869, being possessed of the said stock of merchandise aforesaid, in contemplation of insolvency, did make to Mowry & Co., a copartnership or firm of persons—but the name of the individual members of said firm is unknown to your petitioner, and doing business at the city of Detroit, in the county of Wayne, in the State of Michigan, & in said district—a conveyance of said
251 merchandise, with intent, by such disposition of the said property of them, the said Harlon E. Macary & Henry S. Macary, to defeat or delay the opperation of the said act. And your petitioner further represents that within six calendar months next preceeding the date of this petition, the said Harlon E. Macary & Henry S. Macary, copartners as aforesaid, did commit an act of bankruptcy within the meaning of said act, to wit, in that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period aforesaid, in said district, on the twenty-fifth day of October, 1869, being so possessed of certain estate, property, rights, & credits, to wit, a stock of merchandise, situated in the village of Hudson aforesaid, and being insolvent, did make a transfer and conveyance of the same to Lewis Sloman, of the city of Coldwater, in the county of Branch, in said State of Michigan, with intent to delay and hinder the creditors of them the said Harlon E. Macary & Henry S. Macary, copartners as aforesaid.

And your petitioner further represents that the said Harlon
252 E. Macary and Henry S. Macary, within six calander months next proceeding the date of this petition, did commit an act of bankruptcy within the meaning of said act, to wit: In that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, to wit, at the village of Hudson, in the said district, on the twenty-fifth day of October, A. D. 1869, being possessed of the stock of merchandise aforesaid, situated at the said village of Hudson as aforesaid, & being so possessed & insolvent, did make and execute a conveyance of said merchandise to one Lewis Sloman, of the city Coldwater, in the State of Michigan, with intent to give a preference to Henry Michaels & N. Levi, copartners in business, by the name and firm of Michaels & Levi, doing business at the city of Rochester, in the State of New York, they, the said Michaels & Levi, being creditors of the said Harlon E. & Henry S. Macary, as copartners as aforesaid.

And your petitioner further represents that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period of six calander months next proceeding the date of this petition, did commit an act of bankruptcy within the meaning of said act, to wit, in that the said Harlon E. and Henry S. Macary, within the period aforesaid, & in said district, to wit, on the twenty-
253 fifth day of October, A. D. 1869, being possessed of the stock of merchandise aforesaid, situated at Hudson aforesaid, and being insolvent, did, at the instance & solicitation of Henry Michaels & N. Levi, copartners by the name & firm of Michaels & Levi, doing business at the city of Rochester, in the State of New York, creditors of the said Harlon E. & Henry S. Macary, make & execute a certain conveyance

of said merchandise to one Lewis Sloman, of the city of Coldwater, in the State of Michigan, for the purpose of transfer'ing said merchandise and the proceeds of the said sale thereof to said Michaels & Levi, with intent, by means of said conveyance to said Sloman, to give a preference to said Henry Michaels & N. Levi, copartners as aforesaid, by the name of Michaels & Levi, they, the said Henry Michaels & N. Levi, copartners as last aforesaid, being creditors of the said Harlon E. Macary & Henry S. Macary. And your petitioner further represents that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period of six calendar months next proceeding the date of this petition,
254 did commit an act of bankruptcy within the meaning of said act, to wit, in that the said Harlon E. and Henry S. Macary, copartners as aforesaid, within the period aforesaid, and within said district, to wit, on the twenty-fifth day of October, A. D. 1869, being possessed of the stock of merchandise aforesaid, in contemplation of insolvency, did make to one Lewis Sloman, of the city of Coldwater, in the State of Michigan, a conveyance of said merchandise, with intent, by such a disposition of their property, to defeat or delay the operation of said act. And your petitioner further represents that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period of six calendar months next preseeding the date of this petition, did commit an act of bankruptcy within the meaning of said act, to wit, in that the said Ha'lon E. & Henry S. Macary, within the period aforesaid, & in said district, to wit, on the twenty-fifth day of October, A. D. 1869, being possessed of the stock of merchandise aforesaid, situated at the village of Hudson aforesaid, and being insolvent, did make and execute a conveyance of said merchandise to said Lewis Sloman, of the city of
255 Coldwater, in the State of Michigan, and receive therefor, as the proceeds of such sale, the sum of, to wit, thirty-four hundred & eighty-two and $\frac{50}{100}$ dollars, which sum, as your petitioner is informed & believes, was received partly in money and partly in three promissory notes then made and executed by said Lewis Sloman; and which said proceeds of said sale of said merchandise was then transfer'ed by the said Ha'lon E. & Henry S. Macary, as copartners as aforesaid, to Henry Michaels & N. Levi, copartners in business by the name & firm of Michaels & Levi, doing business at the city of Rochester, in the State of New York, with intent to give a preference to said Michaels & Levi, they being two of the creditors of the said Ha'lon E. & Henry S. Macary, as copartners as aforesaid. And your petitioner further represents that the said Ha'lon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period of six calendar months next proceeding the date of this petition, did commit an act of bankruptcy within the meaning of said act, to wit, in that the said Harlon E. Macary & Henry S. Macary, as copartners as aforesaid, within the period aforesaid, in said
256 district, on the twenty-fifth day of October, A. D. 1869, being possessed of certain estate, property, rights, & credits, to wit, three negotiable promissory notes, bearing date on, to wit, the twenty-fifth day of Oct., A. D. 1869, given by one Lewis Sloman, of the city of Coldwater aforesaid, for, to wit, eight hundred & seventy and $\frac{60}{100}$ dollars each, payable in six, nine, & twelve months from the date thereof, respectively, said note being at said city of Coldwater aforesaid; and they, the said Ha'lon E. & Henry S. Macary, being insolvent, did transfer and deliver said promissory notes to Henry Michaels & N. Levi, of the city of Rochester, in the State of New York, copartners in business by the name & firm of Michaels & Levi, with intent to give a preference to said Michaels & Levi, they being creditors of the said Harlon E. &

Henry S. Macary, as copartners as aforesaid. And your petitioner further represents that the said Harlon E. Macary and Henry S. Macary, as copartners as aforesaid, within the period of six calendar months next preceeding the date of this petition, did commit an act of bankruptcy within the meaning of said act, to wit, in that the said Harlon E. & Henry S. Macary, as copartners as aforesaid, within the
257 period aforesaid, and within said district, to wit, on the twenty-fifth day of October, A. D. 1869, being possessed of certain negotiable promissory notes, made and given by one Lewis Sloman, for the payment of, to wit, two thousand six hundred and eleven dollars & eighty cents, in contemplation of insolvency did transfer to Henry Michaels & N. Levi, of the city of Rochester, copartners in business under and by the name of Michaels & Levi, the said promissary notes, with interest, by such disposition of property of them, the said Harlon E. & Henry S. Macary, copartners as aforesaid, to defeat or delay the operation of said act. Wherefore your petitioner prays that the said Harlon E. Macary & Henry S. Macary, copartners as aforesaid, may be declared bankrupts, and that a warrant may be issued to take possession of their estate, and that the same may be distributed according to law, and that such further proceedings may be had thereon as the law in such cases provides.

A. T. MACARY.

ANDREW HOMELL,
Attorney for Petitioner.

258 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, Adam T. Macary, the petitioning creditor above named, and mentioned and described in the foregoing petition, do hereby make solemn affirmation that the statements contained in the foregoing petition subscribed by me are true so far as the same are stated of my own knowledge, and that those matters which are stated therein on information & belief are true according to the best of my knowledge, information, & belief.

A. T. MACARY,
Petitioner.

Subscribed & affirmed to before me this 13th day of November, A. D. 1869.

JA'S J. HOGABOAM,
U. S. Commissioner, Eastern District of Michigan.

(Endorsed:) Petition for adjudication in bankruptcy. Filed June 26, 1872.

259 EXHIBIT A.

[5 10ct. U. S. rev. stamps cancelled. by M'y, Sept. 3.]

This indenture, made the third day of September, in the year of our Lord one thousand eight hundred and sixty-nine, between Harlow E. Macary and Henry S. Macary, of Hudson, Lenawee County, Michigan, of the one part, and Mowry & Co., of Detroit, Michigan, of the other part, witnesseth, that the said parties of the first part, for and in consideration of the sum of four hundred dollars to them in hand paid by the said party of the second part, at or before the sealing

and delivery of these presents, the receipt whereof is hereby acknowledged, do grant, bargain, and sell unto the said party of the second part, all and singular, the goods and chattels hereinafter mentioned, that is to say, all their stock of goods, consisting of ready-made clothing, hats, caps, tobacco, and cigars, situated in the store now occupied by the parties of the first part, on the north side of Main street, in the village Hudson, county of Lenawee, and State of Michigan, to have and to hold all and singular the goods and chattels hereinbefore granted, bargained, and sold, or mentioned or intended so to be, unto the said party of the second part forever. Said goods and chattels now remaining and continuing in the possession of the said parties of the first part, in Hudson: Provided always, and these presents are upon the express condition, that if the said parties of the first part shall, and do,
160 well and truly pay, or cause to be paid, to the said party of the second part, the sum of four hundred dollars, in manner following, to wit, the sum of one hundred dollars in thirty days from date; one hundred dollars sixty days from date; one hundred dollars ninety days from date, and one hundred dollars one hundred and twenty days from date, with interest at ten per cent. per annum, according to the conditions of four promis'ory notes, then these presents, and every matter herein contained, shall cease, and be null and void. But in case defaults shall be made in payment of the said sum of money above mentioned, or the interest thereon, or any part thereof, at the time above limited for the payment of the same, or if the said parties of the first part shall sell, assign, or dispose of, or attempt to sell, assign, or dispose of, the whole or any part of the said goods and chattels, or remove, or attempt to remove the whole or any part thereof, from the said Hudson, except in the ordinary way of trade, and in this manner they are permitted to do without the written assent of the party of the second part, then and from thenceforth it shall and may be lawful for the said party of the second part, their executors, administrators, or assigns, or his, her, or their authorized agent to enter upon the premises of the said parties of the first part, or any place or places where the said goods
261 and chattels, or any part thereof, may be, and take possession thereof, and sell and dispose of the same for the best price or prices that can be obtained therefor at public vendue, giving six days' notice of such sale, by a written or printed notice, to be posted at one or more public place or places in the said town. And out of the money to arise by such sale thereof, to pay and retain the said sum of money above mentioned, and the interest thereon, and all charges of such sale, (if so much there shall be,) rendering the surplus moneys (if any there shall be, to the said parties of the first part.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

H. S. MACARY.
H. E. MACARY.

OFFICE OF TOWNSHIP CLERK,
Hudson, Mich., Nov. 13, 1869.

I, W. R. Weaver, clerk of the township of Hudson, do hereby certify that the within and foregoing is a true copy of a chattel-mortgage now on file in this office, and of the whole and every part of said original chattel-mortgage.

W. R. WEAVER,
Township Clerk.

262 In the district court of the United States for the eastern district of Michigan.

IN THE MATTER OF HUDSON E. MACARY AND HENRY S. MACARY, ALLEGED BANKRUPTS.

At Hudson, in said district, on the 13th day of November, A. D. 1869, before James J. Hogaboam, esq., United States commissioner for the eastern district of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Seth Bean, of the village of Hudson, in the county of Lenewee, and State of Michigan, being duly sworn and examined at the time and place above mentioned, upon his oath says that he is acquainted with Harlon E. Macary and Henry S. Macary, the alleged bankrupts above mentioned; that on the third day of September, A. D. 1869, Henry S. Macary, one of said alleged bankrupts, and a young man, whose name this deponent does not now remember, but who represented himself to be the agent of Mowry & Co. of Detroit, in the State of Michigan, came into the office of this deponent, and desired this deponent to draw a chattel-mortgage, covering the stock of merchandise of the said
263 Harlon E. Macary and Henry S. Macary for the sum of four hundred dollars, to secure that amount that was due and owing from the said Harlon E. Macary and Henry S. Macary to the said Mowry & Co.

That this deponent advised said Henry S. Macary not to give said mortgage, and said young man not to take said mortgage, but at their urgent solicitation drew up said mortgage, a copy of which is hereto attached and marked "A," and that whereupon the said parties left the office of this deponent, and, as the said Henry S. Macary said, went to the store of the said Harlon E. Macary and Henry S. Macary to sign said mortgage, and thereupon did sign said mortgage.

SETH BEAN.

On the 13th day of November, 1869, personally appeared Seth Bean, the above-named witness, and was duly sworn to the truth of the foregoing statement.

J. J. HOGABOAM,
U. S. Commissioner Eastern District of Michigan.

264 (Endorsed:) Deposition as to acts of bankruptcy. Filed June 26, 1872.

265 In the district court of the United States for the eastern district of Michigan.

IN THE MATTER OF HARLOW E. MACARY AND HENRY S. MACARY, ALLEGED BANKRUPTS. } In bankruptcy.

At Hudson, in said district, on the 13th day of November, A. D. 1869, before James J. Hogoboam, esq., United States commissioner for the eastern district of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

ADAM T. MACARY, of the city of Coldwater, county of Branch, and State of Michigan, being duly affirmed and examined, at the time and

place above mentioned, upon his affirmation says that he is the petitioning creditor in the above matter in bankruptcy; that he is acquainted with Henry S. Macary, one of the alleged bankrupts above mentioned, and that he saw him in the city of Coldwater, on the 25th day of October, A. D. 1869, in company with Lewis Sloman, a resident of the city of Coldwater, and Henry Michaels, who represented himself to be from the city of Rochester, State of New York, and one of the firm of Michaels & Levi of said city, a firm doing business in said city of
266 Rochester, under the name and style of Michaels and Levi. That at that time, and at the request of the said Henry Michaels, the said Henry S. Macary, for and on behalf of himself and his partner, Harlow E. Macary, sold and conveyed the entire stock of clothing and gents' furnishing goods of the said Harlow E. Macary and Henry S. Macary, situated in the village of Hudson, county of Lenawee, and State of Michigan, to the said Lewis Sloman, and received therefor the sum of three thousand four hundred and eighty-two and $\frac{39}{100}$ dollars, partly in money and partly in three promissory notes from the said Lewis Sloman, said notes being signed by the said Sloman, and were given for the sum of eight hundred and seventy and $\frac{39}{100}$ dollars each, and payable in six, nine, and twelve months from their date.

And this affiant further says that the said Michaels, then and there remarked in the hearing of this affiant and of the said Henry S. Macary and the said Lewis Sloman, that the firm of "Macary Brothers" were owing them, the firm of Michaels & Levi, somewhere between four and five thousand dollars, the exact sum this affiant does not now recollect, and it was necessary that they (meaning Harlow E. Macary and Henry S. Macary) should sell the goods to them, the said Michaels & Levi, through a third party.

267 And this affiant further says that thereafter, on said 25th day of October, A. D. 1869, Henry S. Macary received said money and said notes from said Lewis Sloman; the said Henry S. Macary at the time and place aforesaid, at the request of the said Henry Michaels, transferred the said money and the three promissory notes as aforesaid to the said Henry Michaels, for and on behalf of the said Henry Michaels and N. Levi, composing the firm of Michaels & Levi, parties doing business, as this affiant is informed and believes, under the name and style of Michaels & Levi, at the city of Rochester, in the State of New York, and received therefor a receipt in the words and figures following, to wit:

"Rec'd Oct. 25, 1869, of Macary Bro's $3,482.39, as follows: in cash $870.59, the balance in three notes of $870.60 each at six, nine, and twelve months. Signed by Lewis Sloman, in full of all demands to date, Oct. 25, 1869.

"MICHAELS & LEVI."

[5-cent S. U. revenue-stamp.]

Which said receipt is hereto attached and marked Exhibit "B."

A. T. MACARY.

On the 13th day of November, 1869, personally appeared A. T. Macary, the above-named witness, and was duly affirmed to the truth of the foregoing statement.

J. J. HOGABOAM,
U. S. com'r, eastern dist. of Michigan.

268 EXHIBIT "B."

[Rev.-stamp, 5 cents.]

Rec'd Oct. 25, 1869, of Macary Bro's, $3,482.39, as follows: in cash $870.59, the balance in three notes of 870.60 each at six, nine, and twelve months, signed by Lewis Sloman, in full for all demands to date, Oct. 25, 1869.

MICHAELS & LEVI.

(Endorsed:) U. S. district court, eastern dist. of Michigan. In the matter of Harlow E. Macary & Henry S. Macary, bankrupts. Depositions as to acts of bankruptcy. Filed June 26, 1872. Andrew Howell, att'y for petitioner.

269 In the district court of the United States for the eastern district of Michigan.

IN THE MATTER OF HARLOW E. MACARY AND HENRY S. MACARY, ALLEDGED BANKRUPTS.

At Hudson, in said district, on the 16th day of November, A. D. 1869, before James H. Hogaboam, esq., United States commissioner for the eastern district of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

ADAM T. MACARY, of the city of Coldwater, in the county of Branch, and State of Michigan, being duly affirmed and examined at the time and place above mentioned, upon his affirmation says that the said Harlow E. Macary and Henry S. Macary were on and before the 16th day of November, A. D. 1869, and still are, justly and truly indebted unto this affiant in the sum of twenty-two hundred and forty-one and $\frac{93}{100}$ dollars. That a particular description of said debt is the following, to wit, for the sum of twenty-five hundred dollars, money lent by this affiant on or about the fourteenth day of August, A. D. 1868, to the said Harlow E. Macary and Henry S. Macary, payable in one year from the date thereof, with interest at ten per cent. per annum, payable semi-
270 annually; upon which sum there has been paid the sum of three hundred dollars of said principal and all the interest up to August fourteenth, A. D. 1869, leaving still due and owing to this affiant the sum of twenty-two hundred dollars of said principal, and the interest which has accrued since August 14th, 1869, from said Harlow E. and Henry S. Macary.

A. T. MACARY.

On the sixteenth day of November, 1869, appeared personally A. T. Macary, the above-named witness, and was duly sworn to the truth of the foregoing statement.

J. J. HOGABOAM,
U. S. Commissioner Eastern District of Michigan.

(Endorsed:) U. S. district court, eastern dist. of Michigan. In the matter of Harlow E. Macary and Henry S. Macary, bankrupts. No. 391. Paper No. 2. Depositions as to petitioning creditor's claim. Filed June 26, 1872. Andrew Howell, att'y for petitioner.

271 In the district court of the United States for the eastern district of Michigan.

IN THE MATTER OF HARLOW E. MACARY AND HENRY S. MACARY, ALLEGED BANKRUPTS.

At Hudson, in said district, on the 13th day of November, A. D. 1869 before James J. Hogoboam, esq., United States commissioner for the eastern district of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

AUGUSTUS W. OCOBOCK, of the village of Hudson, county of Lenawee, and State of Michigan, being duly sworn and examined at the time and place above mentioned, upon his oath says that he is acquainted with Adam T. Macary, the petitioning creditor in these proceedings; also Harlow E. Macary and Henry S. Macary, the alleged bankrupts. That on or about the fourteenth day of August, A. D. 1868, the said Adam T. Macary executed and delivered to this deponent a mortgage upon his property in the city of Coldwater and State of Michigan, for the sum of twenty-five hundred dollars. That thereupon this deponent delivered to the said Adam T. Macary the said twenty-five hun-
272 dred dollars, which the said Adam T. Macary then and there handed to the said Harlow E. Macary and Henry S. Macary.

A. W. OCOBOCK.

On the 13th day of November, 1869, appeared personally, Augustus W. Ocobock, the above-named witness, and was duly sworn to the truth of the foregoing statement.

J. J. HOGOBOAM,
U. S. Commissioner Eastern District of Michigan.

(Endorsed:) U. S. district court, eastern district of Michigan. In the matter of Harlow E. Macary & Henry S. Macary, bankrupts. Depositions as to proof of claim. Andrew Howell, att'y for petition'. Filed June 26, 1872.

273 Circuit court of the United States, second circuit and northern district of New York. In equity.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Henry S. Macary and Harlow E. Macary, appelle',

vs.

HENRY MICHAELS AND NATHAN LEVI, APPELLANTS.

To the honorable the Supreme Court of the United States:

The petition of Henry Michaels and Nathan Levi, the above-named appellants, respectfully showeth that on the 18th day of May, A. D. 1870, the above-named Hoyt Post, as assignee in bankruptcy of Henry S. Marcary and Harlow E. Macary, filed his bill of complaint in the circuit court of the United States for the second circuit and northern district of New York, in a suit in equity, wherein he alleged, in sub-
274 stance, that the said Henry S. Macary and Harlow E. Macary had been duly adjudged bankrupts, and the said orator had been duly

appointed their assignee, and that within four months next preceeding the filing the petition in bankruptcy, the said Henry S. Macary and Harlow E. Macary, being insolvent and being indebted to the said Henry Michaels and Nathan Levi, the said appellants, with intent to give a preference to the said appellants, assigned and transferred to the said Henry Michaels and Nathan Levi a large amount of goods, wares, and merchandise, which were alleged in said bill of complaint to be of greater value than the sum of two thousand dollars, to wit, to be of the value of five thousand dollars, or that they, the said Henry S. Macary and Harlow E. Macary, within the times aforesaid, and with the intent aforesaid, paid to the said Henry Michaels and Nathan Levi a large sum of money, which was alleged in said bill of complaint to be greater in amount than the sum of two thousand dol-
275 lars, to wit, to be more than three thousand dollars, and that at the time of the aforesaid transfer of goods, and of the aforesaid payment of money, the said Henry Michaels and Nathan Levi had reasonable grounds for believing that the said Henry S. Macary and Harlow E. Macary were insolvent, and that the said assignment or payment was made with intent to give a preference to them, the said Henry Michaels and Nathan Levi, and to defeat the object of the bankrupt act, and was made in fraud of said act, and thereupon the said Hoyt Post, assignee as aforesaid, prayed in his said bill of complaint for a decree that the said Henry Michaels and Nathan Levi, the appellants aforesaid, might be compelled to account for and pay over to said Hoyt Post, assignee as aforesaid, the proceeds and value of said goods, or might be compelled to pay over to said Hoyt Post, assignee as aforesaid, the said sum of money so alleged to have been paid to them by the said
276 Henry S. Macary and Harlow E. Macary as aforesaid, together with interest and the costs of said cause.

And your petitioners further show that, after the filing of said bill of complaint, a writ of subpœna duly issued out of said circuit court, and was duly served on said petitioners, and that your said petitioners thereupon afterwards duly filed their answer to said bill of complaint, and the said Hoyt Post, assignee as aforesaid, replied thereto; whereupon such proceedings were thereupon had in the said cause that on the 8th day of October, A. D. 1872, a decretal order was made herein ordering in substance that the said Henry Michaels and Nathan Levi be decreed to account for and pay over to the said Hoyt Post, assignee as aforesaid, the proceeds and value of said goods so assigned to them as aforesaid by said Henry S. Macary and Harlow E. Macary, or decreed to pay
277 to said Hoyt Post, assignee as aforesaid, the said sum of money so paid to them as aforesaid by said Henry S. Macary and Harlow E. Macary, with interest thereon, as the said Hoyt Post, assignee as aforesaid, should elect, and that the said Henry Michaels and Nathan Levi pay to the said Hoyt Post, assignee as aforesaid, the costs of this suit; and afterwards, and on the 30th day of October, A. D. 1872, a final decree was entered in said cause in said circuit court, wherein it was in substance adjudged as follows: The said Hoyt Post, assignee as aforesaid, made his election to take a decree against the said Henry Michaels and Nathan Levi for the said sum of money so paid to them as aforesaid by the said Henry S. Macary and Harlow E. Macary, with interest on the same; whereupon, in pursuance of said election, the said Henry Michaels and Nathan Levi were ordered, adjudged and decreed to pay to the said Hoyt Post, assignee as aforesaid, for principal and in-
278 terest so aforesaid, the sum of four thousand two hundred and thirteen dollars and sixty-nine cents, ($4,200.13) together with

the costs of this suit; all of which said decretal order and decree are, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore these appellants appeal from the whole of said decretal order and final decree of the circuit court to the Supreme Court of the United States, and respectfully pray that the said final decree of said circuit court, and the bill of complaint, answer, replication, depositions, evidence, proofs, decretal order, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the same anew, and that the said decree of the circuit court and every part thereof, and the said decretal order, may be reversed or such other decree made as to
279 the said Supreme Court shall seem just.

HENRY MICHAELS AND NATHAN LEVI,
Appellants.

By THEODORE BACON,
Sol'r for said Appellants.

Dated Rochester, October 30, 1872.

(Indorsed:) Circuit court of the U. S., second circuit and northern district of New York. Henry Michaels and Nathan Levi, appellants, ads. Hoyt Post, assignee in bankruptcy, appellee. (Copy.) Petition of appeal to the Supreme Court of the U. S. Theodore Bacon, sol'r for appellant', Rochester, N. Y.—Filed November 2, 1872.

281 Circuit court of the United States for the northern district of New York, term, A. D. 1872. In equity.

HOYT POST, ASSIGNEE IN BANKRUPTCY OF Harlow E. Macary and Henry S. Macary,
against
HENRY MICHAELS AND NATHAN LEVI.

And now the above-named defendants, Henry Michaels and Nathan Levi, after final decree entered in this cause, come and show to the court that the matter in dispute exceeds the sum of two thousand dollars, ($2,000,) and thereupon claim an appeal from said final decree to the Supreme Court of the United States next to be holden at Washington, on the first Monday of December, A. D. 1872, and the same is accordingly allowed, and the appellants are ordered to serve the usual citation according to law.

By the court:

L. B. WOODRUFF,
Circuit Judge.

OCTOBER 30, 1872.

282 (Indorsed:) Circuit court of the U. S. Second circuit and northern district of N. Y. Hoyt Post, assignee, &c., appellee, vs. Henry Michaels and Nathan Levi, appellants. Allowance of appeal by Judge Woodruff. Theodore Bacon, sol'r for appellants, Rochester, N. Y.

283 Know all men by these presents, that we, Henry Michaels, Nathan Levi, Joseph Beir, and Isaac M. Sloman, all of the city of Rochester, county of Monroe, and State of New York, are held and firmly bound unto Hoyt Post, assignee in bankruptcy of Harlow E.

Macary and Henry S. Macary, in the full and just sum of nine thousand dollars, to be paid to the said Hoyt Post, assignee in bankruptcy as aforesaid, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately at a circuit court of the United States in and for the northern district of New York, in a suit depending in said court between the said Hoyt Post, assignee in bankruptcy as aforesaid,
284 complainant, and Henry Michaels and Nathan Levi, defendants, which suit was in equity, a final decree was rendered against the said Henry Michaels and Nathan Levi, and the said Henry Michaels and Nathan Levi having obtained an appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the final decree in the aforesaid suit, and a citation directed to the said Hoyt Post, assignee in bankruptcy as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said Henry Michaels and Nathan Levi shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

HENRY MICHAELS. [L. S.]
NATHAN LEVI. [L. S.]
ISAAC M. SLOMAN. [L. S.]
285 JOSEPH BIER. [L. S.]

Sealed and delivered in presence of—
JOHN M. POMEROY.

Approved by—

NORTHERN DISTRICT OF NEW YORK,
In the County of Monroe, ss:

On this 29th day of October, 1872, before me personally appeared Henry Michaels, Nathan Levi, Joseph Beir, and Isaac M. Sloman, to me personally known to be the persons named in and who executed the within obligation, and severally acknowledged that they executed the same.

[SEAL.]

J. D. HUSBANDS,
U. S. Commissioner for said District.

NORTHERN DISTRICT OF NEW YORK,
County of Monroe, ss:

Henry Michaels, Nathan Levi, Joseph Beir, and Isaac M. Sloman, being each duly sworn, doth, each for himself, depose and
286 say that he is a householder and freeholder of the State of New York, and that he is worth the sum of nine thousand dollars ($9,000) over and above all debts and liabilities which he owes or may have incurred, and over and above all property of his which is exempt from execution by the laws of the State of New York or of the United States.

JOSEPH BEIR.
HENRY MICHAELS.
NATHAN LEVI.
ISAAC M. SLOMAN.

Sworn to this 29th day of October, 1872, before me.
[SEAL.] JA. D. HUSBANDS,
U. S. Commissioner for said District.

The within bond and the sureties therein are satisfactory to me.
F. A. MACOMBER,
Sol'r for Compl't.

I have full confidence in the pecuniary ability of the sureties of the within bond.
J. D. HUSBANDS.

OCTOBER 29, 1872.

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288 (Indorsed:) Hoyt Post, assignee, &c., appellee, vs. Michaels & Levi, appellants. Copy. Bond on appeal to the U. S. Supreme Court. Theodore Bacon, sol'r for appellants, Rochester, N. Y. Approved.
L. B. WOODRUFF.

OCT. 30, 1872.

289 The United States of America to Hoyt Post, assignee in bankruptcy of Harlow E. Macary and Henry S. Macary, appellee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States in and for the northern district of New York, wherein Henry Michaels and Nathan Levi are the appellants and you are the appellee, to show cause, if any there be, why the final decree rendered against the said appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Lewis B. Woodruff, circuit judge of the United States, this thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two.
L. B. WOODRUFF,
Circuit Judge.

290 On this day of , in the year of our Lord one thousand eight hundred and , personally appeared before me, the subscriber, and made oath that he delivered a true copy of the within citation to

I hereby admit service upon me of a true copy of the within citation, made this second day of November, 1872, and that such service was made by showing to me the within original citation and the judge's signature thereto, and at the same time by delivering to me, and leaving with me, a true copy of the same. I further say that this was done at Rochester, in the State of New York. I further admit service upon me, at the same time & place, of a copy of the petition of appeal in this action, filed in the clerk's office of the U. S. circuit court for the northern district of New York, on the 2d day of November, 1872.
F. A. MACOMBER,
Sol. for Complainant.

Dated Rochester, November 2d, 1872.

(Indorsed:) Circuit court of the U. S., northern district of N. Y. Henry Michaels and Nathan Levi, appellants, ads. Hoyt Post, assignee, &c., appellee. Citation. Theodore Bacon, sol'r for appellants, Rochester, N. Y. Filed November 5, 1872.

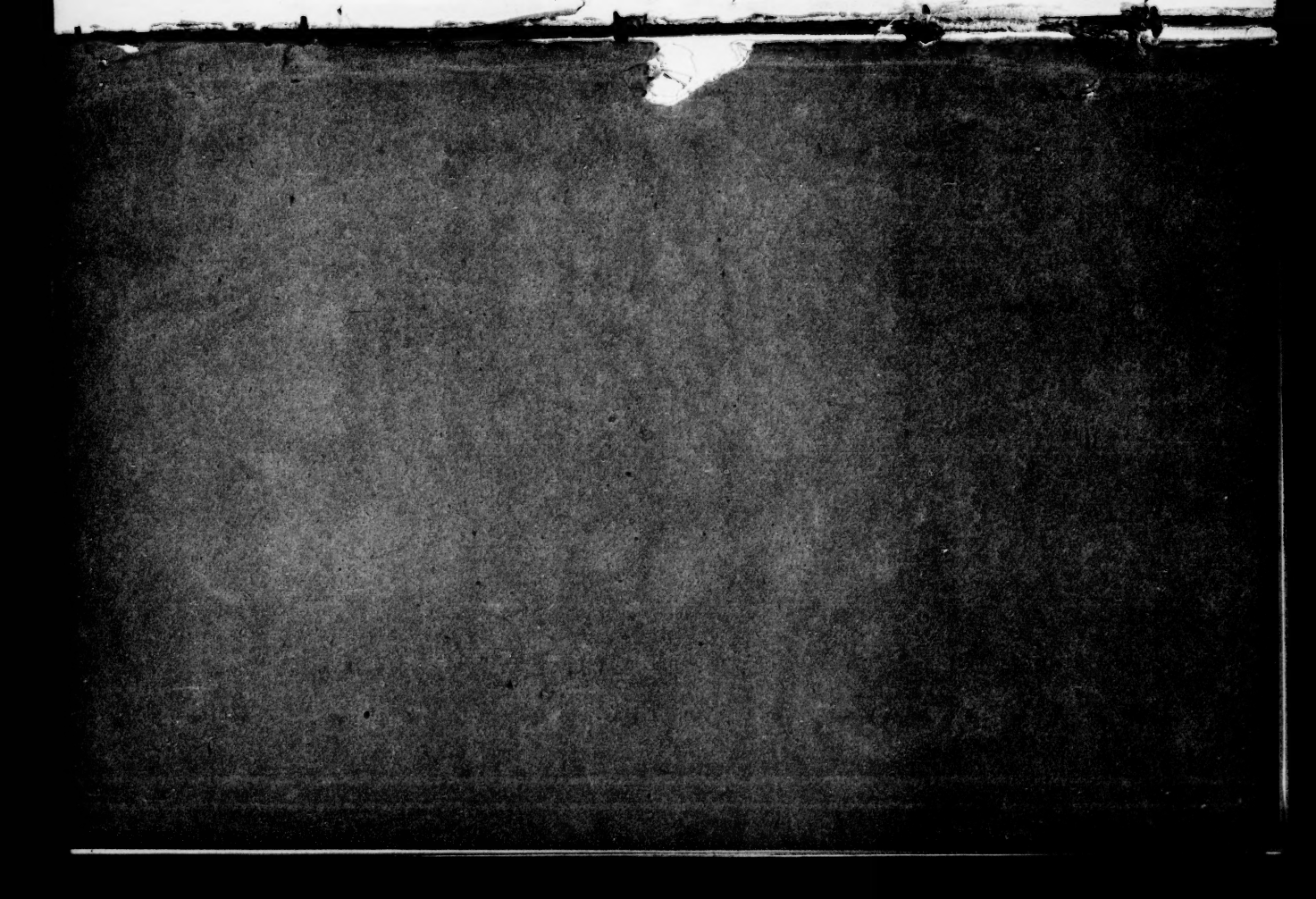
291 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings, testimony and exhibits in the cause entitled "Hoyt Post, assignee in bankruptcy of Harlow E. Macary and Henry S. Macary, vs. Henry Michaels and Nathan Levi."

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Utica, in said district, this 25th day of November, A. D. 1872, and of the Independence of the said United States the ninety-seventh.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsement on cover:) No. 365. Henry Michaels & Nathan Levi, appellants, vs. Hoyt Post, assignee in bankruptcy of Harlow E. Macary & Henry S. Macary. N. New York. C. C. U. S. Filed 11th December, 1872.



SUPREME COURT.

IN SUPREME COURT OF THE UNITED STATES.

HENRY MICHAELS and NATHAN LEVI, Appellants,
vs.
HOYT POST, Assignee in Bankruptcy of HARLOW E. MACARY and HENRY S. MACARY, Appellee.

ABSTRACT AND BRIEF

FOR THE APPELLANTS.

This is an appeal from a decree made on the 26th day October, 1872, by the Circuit Court of the United States for the Northern District of New York, in a suit in Equity in which Hoyt Post, Assignee, &c., was the complainant, and Michaels and Levi were the defendants, whereby the said defendants were adjudged to pay to the said complainant the sum of $4,213.69, and the further sum of $196.15 costs; and were also adjudged to be debarred from any share or dividend in the estate of the said bankrupts in the hands of the complainant as such assignee. The decree is found in the printed record at

p. 7.

The bill of complaint was filed May 18th, 1872; proofs were taken, and the cause was heard on the pleadings and

proofs at a Circuit Court held by the Hon. Lewis B. Woodruff, on the 26th day of June, 1872, and on the 8th of October, 1872, an order directing a decree for the complainant was made, which is found in the printed record at p. 6.

ASSIGNMENT OF ERRORS.

The appellants respectfully urge and insist that in making said final decree and said order upon which the same is based, the said Circuit Court erred in the following particulars, that is to say:

I. The said court erred in adjudging that the said complainant do recover said sum of $4,213.69, or any other sum from the appellants.

II. The said court erred in adjudging that the said complainant do recover any sum as and for costs against said appellants.

III. The said court erred in adjudging that the appellants be debarred from any share in the estate of the said bankrupts in the hands of the complainant as assignee.

IV. The said court erred in not adjudging that the bill of complaint be dismissed, with costs to the appellants.

V. The said court erred in not deciding and holding that the bankruptcy proceedings mentioned in the pleadings and proofs, and in which the complainant was appointed assignee, were wholly void and of no effect, on the ground that the U. S. District Court in which such proceedings were held, had no jurisdiction over the parties thereto or the subject matter thereof, because the petitioning creditor therein was not a creditor of the said bankrupts.

VI. The said court erred in not deciding and holding that the said bankruptcy proceedings mentioned in the last preceding paragraph, were wholly void and of no effect, on the ground that they were fraudulently instituted and carried on, and were instituted and carried on by the petitioning creditor therein in fraud of the said U. S. District Court, and by fraudulent imposition upon and deception of said U. S. District Court.

VII. The said court erred in deciding and holding that the said bankrupts Harlow E. Macary and Henry S. Macary had made a transfer of goods or other property, or payment of money to the appellants in such a manner that and by means of which the said appellants had violated any of the provisions of the 35th and 39th sections of the Bankrupt Act, or either of them. And the appellants urge and insist that the said court should have decided that the transfer or payment made by the said bankrupts to the appellants mentioned in the pleadings and proofs, was not in violation of any provision of either the 35th section or the 39th section, or any other section of the said Act, and that such payment or transfer was made to the appellants without any knowledge on their part, and without any reasonable cause or grounds to believe on their part that any fraudulent preference of themselves was made or intended to be made, or that any fraud upon the said Act was made or intended thereby; and that in such entire transaction the said appellants acted in good faith and without any design to obtain or receive any preference over other creditors of said bankrupts, or to commit or suffer any fraud upon said Act.

ABSTRACT OF THE CASE.

I. ABSTRACT OF THE PLEADINGS.

The Bill of Complaint is found at pp. 1–4 of the printed record. It alleges:

A creditor's petition in bankruptcy was filed on the 19th day of November, 1869, in the District Court of the U. S. for the Eastern District of Michigan, against Harlow E. Macary and Henry S. Macary; therein, on the 1st December, 1869, said Harlow E. and Henry S. were adjudicated bankrupts; on the 8th January, 1870, the complainant was appointed assignee of said bankrupts; and on the 13th January, 1870, an assignment of their estate was executed to the complainant in accordance with the provisions of the statute.

Printed Record, fols. 4, 5.

On the 25th October, 1869, said Macarys were merchants, partners, at Hudson, Michigan; that at such time they were insolvent, and were indebted, among others, to Michaels and Levi, merchants, at Rochester, N. Y., in an amount between $4,000 and $5,000, and were also indebted in a large amount to other persons.

Fol. 6.

The bill then alleges, with much detail of evidentiary circumstances, that on or about said last named date said bankrupts, being then insolvent, transferred to said Michaels and Levi, creditors as aforesaid, their entire stock in trade in payment of their said indebtedness; that such transfer was made in form to one Sloman, who in form paid some cash and his notes—in all to the amount of about $4,000, for said goods; that the transfer was in fact to said Michaels and Levi, who thus obtained either the goods themselves or the said price thereof; that such transfer of goods or payment of their value was made by said bankrupts with an intent to give an unlawful preference to said Michaels and Levi, and with intent to commit a fraud upon the Bankrupt Act; and that said Michaels and Levi at the time of such transfer or payment knew, or had reasonable grounds to believe, that said Macarys were insolvent, and knew, or had reasonable grounds to believe, that such fraudulent preference and such fraud upon said Act were intended; that such transfer or paymant were not made in the ordinary course of business of the said Macarys,—and was made within four months next before the filing of the said petition in bankruptcy.

Fols. 7, 12.

The bill prays that the defendants Michaels and Levi be decreed to account for the value of the goods transferred to them, or for the price of said goods paid by said Sloman and turned over to them.

Fols. 13, 14

The answer of the defendants Michaels and Levi, is found in the printed record at pp. 4, 5.

First—It denies each and every of the allegations and statements in the bill of complaint, generally and specifically.

Secondly—Alleges that said Macarys sold their stock of goods to Sloman, and Sloman purchased the same in good faith without any intention of defrauding in any manner the creditors of said Macarys, and without any knowledge or information that there were creditors of said Macarys who could be affected by such purchase; that such purchase was made with the knowledge and consent of A. T. Macary the petitioning creditor in said bankrupt proceedings, who prior to such purchase and in order to induce Sloman to make the same, released in full his demands against said Macarys, the bankrupts.

Fol. 17

Thirdly—That the proceedings in bankruptcy set out in the bill were null and void, on the ground that the said A. T Macary, the petitioning creditor therein, was not a creditor of the said Harlow E. and Henry S., and on the further ground that such proceedings were a fraud upon the bankrupt court and upon the bankrupt act.

Fol. 18.

Fourthly—That the proceeds or price of said sale to said Sloman were paid over to the defendants and received by them, by the consent and approval of said A. T. Macary, the petitioning creditor; and that there were no other creditors of said Macarys who could institute such bankrupt proceedings against them except the said A. T. Macary.

Fol. 18.

Note—This answer was not in any manner excepted to for any cause, nor were any of the defendant's proofs at any time objected to on the ground that they were inadmissible under the answer. If it should be suggested that the answer is not in all respects as full and as complete as the rules of equity pleading demand, the court will it is submitted treat it as amended so as to conform to the defence actually proved, because such defence was admitted

without a suggestion of objection, and the case was heard without any allusion to the pleadings and upon the facts as actually established by the evidence.

II. ABSTRACT OF THE PROOFS.

As there is conflict in the evidence in respect to some important particulars, it is necessary to give the case as made by each party separately.

CASE AS MADE BY THE APPELLANTS.

The evidence on the part of the appellants consists of the depositions of Henry Michaels, the first and longest of which is on pp. 77—88, and a second on pp. 50—52; of Louis Slowman, on pp. 39—50; and of John B. Shipman, on pp. 56—58; and also of the following exhibits, viz;

Deft's ex. A., p. 68, fol. 199. Bill of sale from Macary Bros. to L. Sloman.

Deft's ex. B., p. 69, fol. 199. Release by A. T. Macary the petitioning creditor of all his claims against the Macary Bros.

Deft's ex. C., p. 69, 70 fols. 200, 201. Four notes of Macary Bros. to Mowry & Co., dated Sep. 3d, 1869, secured by chattel mortgage by and to same, and an assignment of said notes and chattel mortgage by Mowry & Co. to L. Sloman, dated Nov. 11th, 1869.

Deft's ex. D., p. 70, fol. 201. Assignment of all debts due them by Macary Bros. to L. Sloman, dated Oct. 27th, 1869.

Deft's ex. E., p. 70, fol. 201. Authority from Harlow E. to Henry S. Macary, to sell &c., and to sign his name &c., dated Oct. 25th, 1869.

And also the following documentary proofs, viz;

p. 72, fol. 207. Stipulation as to creditors who have proved their claims in the bankrupt proceedings.

pp. 73–77, fol. 209–216. Stipulation as to the bankrupt proceedings, and the bankrupt's schedule of liabilties &c. filed therein.

pp. 88—93. Creditors's petition of A. T. Macary the petitioning creditor in said bankruptcy proceedings, sworn to Nov. 13th, 1869, and exhibit attached thereto.

pp. 94–96, fols. 265–270. Deposition of said A. T. Macary in said proceedings, as to the act of bankruptcy charged, and debt due him, which accompanied said creditors petition, and upon which the adjudication was obtained by default, sworn to Nov. 13th, and Nov. 16th, 1869.

The appellants also rely upon several of the complainant's exhibits, and upon much of the evidence introduced on his part, which will be particularly pointed out in the sequel.

FACTS AS ESTABLISHED BY APL'TS PROOFS.

Prior to and during all the times referred to in the evidence, the appellants Michaels and Levi were wholesale dealers in men's clothing, &c., doing business at Rochester, N. Y., and commenced doing business with Macary Bros. about August 1868.

Fol. 218.

Harlow E. Macary and Henry S. Macary were partners doing business in Hudson, Michigan, under the name of Macary Bros., and commenced August 1868. Their business was "clothing, hats, caps and gents' furnishing goods." The father, A. T. Macary, says they "were engaged in the clothing and tobacco business together."

Fol. 32.

Both the sons, however,testify that their business was as above stated. This was their only firm business. It seems

that one of them, Henry S., had engaged in some private trade in tobacco, but in this the firm had no connection.

Testimony of Harlow E. p. 14, fol. 49.—p. 19, fol. 62.

Testimony of Henry S. p. 24, fol. 75.

List of debts proved. p. 72, fol. 207.

A. T. Macary, the father, lives at Coldwater, a few miles from Hudson. Louis Sloman, also lives at Coldwater and was a dealer in clothing and furnishing goods.

On the 25th of October, 1869, the Macary Bros. were heavily indebted, and the most important of their firm debts, for their firm business, was as follows: To Michaels & Levi, $4,600; Beir & Stern, $475.74; Sabey & Co. $368.75; Sloman & Rosenthal, $343.16; all these creditors residing at Rochester, N. Y., and being wholesale clothing merchants; also to the father, A. T. Macary, for borrowed money $2,200. They owed a few other small firm debts in their regular business. Henry S. owed small debts for tobacco and cigars, by far the largest of which was to Mowry & Co. of Detroit, about $350, for which both the brothers had given their joint notes and a chattel mortgage on their stock in trade.

Testimony of Harlow E. p. 15, fol. 50. p. 19, fol. 62.

Deft's ex. C. pp. 69, 70, fols. 200, 201.

List of debts proved, p. 72, fol. 207.

Schedule of debts filed, pp. 74—76.

I now narrate the subsequent transaction as estalished by the appellant's proofs.

Michaels on a business trip through the west stopped at Hudson on Friday, October 22d, 1869, and called at the store of the Macary Bros. that afternoon. His interview on that and the next day, were with Henry S., Harlow E. being confined at home. The Macary Bros. were indebted to his firm about $4,600, at least $2,000 past due. He knew they were indebted to the other Rochester Houses, and he was in fact acting on behalf of those houses as well as for his own firm. H endeavored to ascertain from Henry S. the true condition of the business, property and debts of the Macary Bros. On that day and the next,

Saturday, he and Henry took an inventory of the stock on hand, reckoning it at cost prices, Henry S. naming the goods and prices and Michaels writing down the same. The amount of the goods thus ascertained was about $4,500. He enquired what other debts they owed besides that to his firm, and Henry S. to'd him they owed the Rochester houses above named, and a debt of $2,200 to their father, A. T. Macary.

These debts footed up to $7,988·65. Neither Henry nor Harlow told him of any other debts, but on the contrary assured him these were all. In particular they did not inform him nor Sloman of the chattel mortgage to Mowry & Co., and Michaels did not know of this debt and mortgage until he was informed of it by letter after Sloman had discovered it. Michaels did not take nor examine the books, and although Henry S. testifies that Michaels took the books and examined them, *it is a very noticeable fact in the case that none of the books have been put in evidence by the complainant, so that it might be seen whether they disclosed any other indebtedness.* There is no evidence to show, nor any reason to suppose, that Michaels had any knowledge or suspicion that one of the Macarys was ever engaged in any tobacco business, or that either of them or the firm had any business but that which they purported to carry on, viz: that of clothing and mens' furnishing goods.

Michaels thus ascertaining that the Macarys were hopelessly insolvent, proposed to Henry S. on Saturday, a method by which they should, as far as possible, pay all their creditors, and should settle with, and be discharged from all liability by all of such creditors. He proposed that the Macary Bros. should sell out their entire stock of goods to some responsible person at a reasonable price; that they should thereupon turn over the proceeds to Michaels for his firm and the other Rochester creditors; that he would thereupon give a discharge of all the debts due his firm and would get a similar discharge from all the other Rochester creditors for whom he was acting as well as for his own firm; that this should all be done, provided

the Macary Bros. would obtain a similar discharge from their father, A. T. Macary. In this manner all the creditors whom he knew of, and who he had been informed *were all the creditors in fact*, would be voluntary and legally settled with and satisfied. This proposition was made and this condition demanded by him for the express object explained to them of having all the creditors voluntarily satisfied, so that the transaction would be legal. This proposition was communicated to Harlow E. on Monday forenoon—both the brothers assented to it. Louis Sloman, of Coldwater, for whom one of the Macarys had previously been a clerk, was suggested as the purchaser. It was arranged that Michaels and Henry S. should go to Coldwater at once, to arrange with A. T. Macary and to complete the transaction. To this end Harlow E. gave Henry S. a written authority to use his name in the expected negotiation and transfer.

See this writing, Deft's ex. E. p. 70, fol. 201.

Henry S. telegraphed to his father, and Michaels telegraphed to Sloman, and the two started for Coldwater, arriving there some time in the afternoon of that day, the 25th October, 1869.

See deposition of Michaels, pp. 77–88.
pp. 50–52.

Michaels and Henry S. arrived at Coldwater and met Sloman at the cars. They walked up into the town—a walk of 20 or 30 minutes—and Henry S. and Sloman arranged the terms of purchase, viz: that Sloman should buy the goods at 75 per cent. of the inventory just made, and should pay by giving four notes, each for one-fourth of the price. They separated, Henry S. went to his fathers, and during this interval it is certain the matter was communicated by him to the father and the latters consent obtained. Michaels and Sloman went to the latters store, and there Sloman calculated the amount of the purchase price, estimated the amount of each quarterly payment, and concluded to make the first payment in cash down instead of by his note. For that purpose he had a draft on N. Y.

for $500, and cash on hand $200, and he drew his check on his bankers for the balance. The whole price was $3,482.39. The payment was $870.59, and each of the three notes was $870.60.

After this interval the parties all went to the office of Mr. Shipman, a lawyer, to have the necessary papers drawn and the transaction completed.

What took place at this interview will doubtless be decisive of the case. I cannot in this abstract enter into the details of the voluminous testimony. A. T. Macary and Henry S. Macary give one account, Michaels, Sloman and Shipman give another. It is impossible to reconcile the two. The difference is too radical to be explained by any failure of memory. It is enough for me to say here that the accounts given by Michaels, Sloman and Shipman, agree in every substantial particular, Shipman's testimony completely corroborating that of the other two, and they all contradict in every important particular the account given by the two Macarys. I can only ask this court to compare these several statements more carefully than I have the opprtunity of doing in this argument.

The following is the outline of what took place at Mr. Shipman's office: In the first place there was no negotiation there at all. All this had been completed prior to their call upon the lawyer. All the parties were there during the whole interview, Sloman among them from the beginning. There was but one interview; there was no adjourning for tea; everything was done and finished at one sitting. Sloman informed Mr. Shipmen of the entire arrangement and requested him to draw the papers. Shipman asked all the other parties, and especially A. T. Macary, the father, if they understood it, and if the arrangement was as stated. They assenting, he proceeded to draw the papers. He first drew a paper for A. T. Macary to execute, but it being considered too long and detailed he threw it away and drew another. This he read over to A. T. Macary twice, and asked the latter if he understood it and if it was right. A. T. Macary assented, signed the

document, and delivered it to Sloman who took and kept it as one of his muniments of title. The paper is as follows:

"Macary Bros., of Hudson, Michigan, (who are my "sons) being desirous of selling their stock of merchan- "dize and goods in said place to Louis Sloman, but the "said Sloman being afraid of their creditors, to confirm "said sale and his title, and in consideration that he "should buy them out, I do hereby acknowledge receipt "in full of all demands against the said Macary Bros. to "this date, Oct. 25, 1869. A. T. MACARY."

Defts. Ex. B., p. 69, fol. 199.

Shipman then drew the following bill of sale, which was at once executed by Henry S., in the name of his firm, and delivered to Sloman:

"In consideration of $3,482.39, received of Lewis Slo- "man as follows: $870,59-100 in cash, and the balance "in three notes of $870,60-100 each, due in six, nine "and twelve months, we do hereby bargain and sell to "the said Louis Sloman, a certain stock of gent's fur- "nishing goods and clothing, as per inventory delivered "with this, now in the store occupied by us in Hudson, "Michigan. Oct. 25, 1869. MACARY BROS."

Defts. Ex. A, p. 68, fol. 199.

Sloman then handed to Henry S. the above named cash and his notes as above described. These notes were given in evidence.

Complt's Ex. No. 1, pp. 67, 68; fols. 197, 198.

Upon receiving this cash and these notes, Henry S. immediately handed them to Michaels, who executed and gave to Henry S. the following receipt and discharge:

"Rec'd Oct. 25, 1869, of Macary Bros. $3,482.39, as "follows: in cash $870.59, the balance in three notes of "$870.60 each, at six, nine and twelve months, signed "by Louis Sloman in full of all demands to date.

"MICHAELS & LEVI."

Complt's Ex. A, p. 14, fol. 49.

This done, the parties separated. Michaels left Coldwater that night. On arriving home he settled with all

the other Rochester creditors, paying their respective claims and taking their discharges in full. None of them have made any claim nor proved any demand in the bankruptcy proceedings.

See deposition of Michaels in full, pp. 77–88.
" " " " pp. 50–52.
" " J. B. Shipman, pp. 56–58.
" " Sloman, pp. 39,–40, fols. 119–122; pp. 42–46 fols. 127–140; pp. 48–50, fols. 145–151.

On the next day, Tuesday, Oct. 26th, Sloman went to Hudson and took possession of the store; changed the sign to his own name; made an arrangement with the young Macarys to continue in charge of the store as his clerks at agreed wages; instructed them as to keeping the accounts and as to payments to him of moneys received; found out what goods were needed at once, so as to order them; and returned to Coldwater.

In a day or two he was told by a third person that there was a chattel mortgage on the goods previously given by the Macary Brothers. He at once went to Hudson, and they, after some prevarication, acknowledged the fact. At his request they at once and without any hesitation or objection assigned to him all their outstanding book accounts and debts due, as indemnity against this chattel mortgage. The following is such assignment:

"For value received, we assign all debts owing to us to "this date to Louis Sloman.

"Hudson, Oct. 27, 1869. MACARY BROS."

Deft's Ex. D, p. 70, fol. 201.

Returning to Coldwater, Sloman counseled his lawyer as to the situation, and on account of this mortgage and of some other acts of the Macarys of which he was then informed, he considered it would be unsafe to leave the businesss in their custody, and concluded to remove the goods to Coldwater and place them with his stock there. For this purpose he went to Hudson on the following Saturday, Oct. 30th, and informed the Macarys of his intention. They objected, and turned him out of the store, locking it and taking possession of the key. On the next

Monday—Nov. 1st—Sloman replevied the goods from the Macarys possession. They did not defend this replevin suit, and judgment was afterwards rendered in his favor. He took the goods to Coldwater; placed them with his stock there and sold them in the regular course of his business.

After this Sloman communicated with Mowry & Co., the holders of the said chattel mortgage. The result was that they assigned to him the notes given by the Macarys, on which there was due $358.88, and the chattel mortgage given to secure the same; which transfer was made on the 11th Nov. 1869, before the filing of the petition in bankruptcy. It may be noticed that these notes are not executed in the firm name, but in the individual names of the Macarys.

See Defts Ex. C, pp. 69, 70, fols. 200, 201.

Mr. Sloman was subjected to a very severe and in some respects unfair cross-examination, in respect chiefly to the days and dates and times on which he did certain things, or was told or said certain things. For example, as to the days of the week on which he went to Hudson, and on what day and before which visit he first was told of the chattel mortgage,—and the like. He was even asked as to the reasons of his doing or not doing certain acts, and the counsel went so far as—after the witness had said that he didn't remember whether he did or did not do a certain act utterly immaterial in itself,—to ask, "If you did not do it, what was the reason you did not?" When it is remembered that this testimony was given more than a year after the events happened, it is not strange, on the contrary it is almost certain, that any witness would be unable to recollect these matters of exact time, and of exact order of sequence and the like, which all persons of experience know pass from the memory the easiest and the soonest of any past facts. Nor is it strange that a witness falling into the hands of astute counsel should become confused in answering questions concerning such matters. Mr. Sloman does seem to have become thus con-

fused at one portion of his examination, but he finally cleared up even these slight confusions, and his narrative is corroborated by all the documentary evidence in the case, relating to this matter, viz: his letter to the Macarys, dated the 28tl., showing that he had been in Hudson on the 26th, Tuesday—as he testified, and by the assignment of the book accounts and dated the 27th—Wednesday, which shows that he came to Hudson again a second time in the middle of the week as he testified after learning from a neighbor of the chattel mortgage. Through all this sharp and protracted cross examination *Mr. Sloman does not once contradict himself, or become confused, or vary in his statement with reference to a single important, substantial or material fact in the case.*

Deposition of Sloman, pp. 40–42, fols. 123–127; pp. 46, 47, fols. 140–144; pp. 49, 50, fols. 148–151.

Very soon after the replevin suit by Sloman, A. T. Macary took steps to put his sons into bankruptcy. He instituted the proceedings, and made the preliminary depositions. The adjudication was by default. It is perfectly plain from what is forced out of the father and the sons—although they contradict each other,—that they all took a part in instituting the proceedings; that the sons, or one of them at least, took an active part in assisting the father and the counsel to commence them. The petition of A. T. Macary was sworn to by him Nov. 13th, 1869. I ask the Court to note the fact, that leaving out Michaels and the other Rochester business firm creditors who had been settled with, and leaving out Mowry & Co., whose claim was not against the firm, but against Henry S., and assumed by both brothers individually in the form of their joint personal notes, and which claim had been assigned, together with the chattel mortgage, to Sloman before the proceedings in bankruptcy were commenced,—leaving out all these, there was not a single creditor of the firm or of either partners, as shown by the schedules filed, who could have instituted the bankruptcy proceedings, except

the father; not one creditor had a demand nearly large enough to give the court jurisdiction.

Deposition of A. T. Macary, pp. 11–14, fols. 41–49.
" of Harlow E., pp. 18, 19, fols. 61, 62.
" of Henry S., pp. 34–36, fols. 104–110.
Creditors Petition, and deposition of A. T. Macary, pp. 89–96.
Schedule of Creditors, pp. 74–76.

TESTIMONY ON THE PART OF THE COMPLAINANT.

The testimony consists of the depositions of A. T. Macary, at pp. 8–14; of Harlow E. Macary, at pp. 14–22, and p. 59; of Mary E. Macary, wife of last witness, at pp. 22, 23; of Henry S. Macary, at pp. 24–37; and of L. Johnson, W. J. Bowen, at pp. 53–56, and at p. 60; and of certain exhibits, viz: Ex. A, p. 14, fol. 49, being the receipt and discharge of Michaels and Levi; Ex. B, p. 23, fol. 73, being a letter from Sloman to H. E. Macary; Ex. "A" and "B," pp. 60–61, being two drafts; Ex. "C" and "D," p. 61, being transcripts of Sloman's account on the books of his banker; Ex. "E" p. 62, being telegram by Michaels to Sloman; Ex. No. 2, pp. 62–67, being portion of the inventory, and Ex. No. 1, pp. 67, 68, being the notes given by Sloman to the Macary Bros.

The Complainant's Version.—Time and space will not permit more than a bare outline of this story. To appreciate it in all its parts and bearings the very language of the witnesses must be read and carefully compared with each other's statements, and with other facts in the case. This outline is as follows, as given by Henry S., Harlow E., Mrs. Mary, and the father Adam T.: Michaels came to Hudson on Friday, Oct. 22, 1869; made a thorough examination of the Macary Bros' affairs; helped make an inventory of their goods; took possession of their books and kept them two or three days; was informed of all the debts they owed, was even told of the chattel mortgage on all their stock to Mowry & Co., and

said he didn't care; discovered that they had goods to amount of about $4,500, cost prices, thus subject to the lien of a mortgage, and that they owed debts amounting to over $9,000 (for the Macarys swear that he was informed of all that are stated in the schedules, and this added to the debt due his own firm amount to over $9,000). After thus discovering that the Macary Bros. were hopelessly insolvent, Mr. Michaels made them a proposition. The witnesses do not agree as to all the features of this proposition, but they do as to some of its features. It was as follows: The Macary Bros. were to transfer their stock of goods to Michaels and Levi under color of transferring them to one Louis Sloman. There is a great deal of confusion in the testimony on this point; the witnesses are so eager to make it appear that the transfer was to be to Michaels and Levi in reality, that they do not explain clearly, and some of them not at all, how Sloman was to be brought in, and what part he was to play. Notwithstanding this secret transfer to Michaels and Levi, or to Sloman, the Macary Bros. were to remain in possession exactly as they had done before, carrying on the business and having complete control of it, buying goods in the name of Sloman. Michaels promised to re-stock the store, to let them have all the goods they wanted in future, and even he was to get an agent of his to find a better location for their business than Hudson was. They were to go on and sell the goods as before, receive and control all the proceeds, and out of the sales were to pay the running expenses and their private expenses of living, and after that the other creditors. In so much of the story all the complainant's witnesses agree; they repeat over and over again that Michaels promised to re-stock the store, and to let them have all the goods they wanted in future, and that the business was to be managed by them exactly as it had been before. Even Mrs. Macary, who is brought in to tell of a conversation at the dinner table on Sunday between Michaels and her husband and his brother, and cannot recall one other thing that was said, does remember this, that Michaels was to re-stock the store and let them have

all the goods they wanted, and they were to continue in the complete management.

Upon the point how Michaels and Levi were to get their debt by means of this pleasant arrangement, there is no such agreement and certainty among these witnesses. Hartow E., Mrs. Mary, and Adam T., in their statement of the proposition make no provision at all for the debt due the defendants,—they make not the slightest allusion to it, or to its being paid or secured in any manner. They all insist that the Macarys were to get their living, and the other creditors were perhaps to be paid, but make no provision for paying the defendants. Henry S. varies a little in this respect from the others. He says that after the Macarys had taken out the expenses of the store and of their own living, and other payments, the balance was to be remitted to the defendants until their debt was paid.

To one matter I call particular attention of the Court. In stating the proposals made by Michaels and accepted by the other parties, no one of the witnesses even hints at any arrangement that in the sale to Sloman or to Michaels and Levi, any price was to be paid to the Macary Bros. for the goods, or that this price was to be paid over to the defendants, or that the defendants were to give a discharge of their claim. They all state a certain arrangement as having been made at Hudson between Michaels and the sons. They insist that the same arrangement was re-affirmed with the father and the sons in Mr. Shipman's office; and immediately thereafter the parties execute papers and make a settlement entirely different from such arrangement, different from it in every particular, and not a word of explanation is given as to how the change came to be made.

But to return to the story: Michaels' proposition embraced the further point, that A. T. Macary, the father, *was to go through the form of giving up his claim*, so THAT HE COULD NOT COME UPON AND TROUBLE HIS OWN SONS.

The proposal having been accepted by the sons, Michaels and Henry S. went to Coldwater to see the father and ex-

plain the matter to him. Michaels and Henry S. and A. T. Macary met at the office of Shipman in the afternoon of October 25th, and Michaels there explained to the father the proposition as I have stated it. Papers were drawn up ready to be executed. Sloman was not present at this time. The parties went to tea before anything had been done. After tea they all returned together with Sloman and the papers were executed and the parties separated.

This is a bare outline of the story. For the details, and for the witnesses description of the papers which they executed, and of the conversation among themselves, and of the whole transaction I must refer to the testimony.

In regard to the remaining transactions of the week at Hudson down to the time when Sloman replevined the goods, Harlow E. and Henry S. tell a story the coloring of which is different from Sloman's version; but they do not contradict him in any essential particular. For example, they admit their transfer of all the book accounts to him as security against the chattel mortgage which he had discovered, and they don't suggest any demur or hesitation on their part in doing so.

The rest of the plaintiff's evidence is an attempt to contradict Mr. Sloman in respect to incidental statements in his testimony, and it consists of the business records and accounts in the bank at Coldwater with which Mr. Sloman did business. I shall refer to this particular subject in the sequel.

With this outline of the case, as presented by the respective parties, I proceed to my argument thereon.

ARGUMENT FOR THE APPELLANTS.

FIRST POINT.

The bankruptcy proceedings and the adjudication therein of the Macary Brothers as bankrupts were utterly void from a want of jurisdiction in the District Court, and also because the proceedings and adjudication were instituted and obtained through the gross fraud of the petitioning

creditor A. T. Macary, and by his wilful concealment o the truth and imposition upon that court. The complainants entire authority resting upon said adjudication, he cannot maintain this suit as assignee, and his bill of complaint should be dismissed on that ground alone.

As the point above stated is decisive of the controversy, and as it presents a question of great practical importance in the administration of the bankruptcy system, I shall give it a careful examination and refer to all the leading authorities, although the general subject of jurisdiction, and collateral attacks upon judgments for alleged absence thereof, has been quite recently before this court, and has been passed upon in two most carefully considered cases. I believe that the principles announced by this court in those two cases are decisive of the present, but it is proper to show that such principles apply to the case at bar as well as to the special facts and circumstances which were the immediate occasions of the decisions referred to.

It is a familiar general rule that judgments, in what ever court rendered, are not conclusive against persons who were strangers to the proceedings.

To this elementary doctrine there is an important exception, namely: It the judgment in the prior proceeding be a decree *in rem*, declaring and determining the peculiar character of some thing,—e. g. a ship,—or the peculiar status of some person,—e. g. a wife, an executor, a bankrupt,—then such judgment is conclusive against all the world. The adjudication of bankruptcy is doubtless a judgment *in rem*.

1 Greenl. on Ev. § 525.

But to this last rule the cases make two exceptions, as well established as the rule itself, viz: The judgment *in rem* may always be collaterally attacked and impeached by a stranger to it (1) by showing that the court which rendered it had not jurisdiction; or (2) by showing that it was procured by fraud. I shall examine these two exceptions and apply them to the present case, taking up in order, *first*, the objection as to the jurisdiction, and *second*, that of fraud.

First—An adudication of bankruptcy, being a decree *in rem*, may be impeached by a stranger to it by his showing, either in a direct proceeding brought for that urpose or by collateral attack and by way of defence, that the court rendering it had not in fact acquired jurisdiction.

We are not here obliged to discuss any of the conflicting and doubtful rules as to tribunals of superior and general jurisdiction. We are concerned only with courts of special, limited and statutory jurisdiction, and as to these the doctrines are established and the decisions uniform. To their determinations the same rules apply as to decrees *in rem*. In other words, the judgments of these classes of courts whether *in rem* or *in personam*, are all treated in the same manner and subject to the same control.

The correctness of my first proposition above stated in respect to this adjudication of bankruptcy, is established by the following sub-points which contain the general doctrines touching the effect of such classes of judgments.

I.—In the case of tribunals of limited, special, and *a fortiori* of mere statutory jurisdiction, the jurisdiction is not presumed, but must affirmatively appear on the record, otherwise the judgment is void, or at least voidable. If the record shows affirmatively that the jurisdictional facts did not exist, the judgment is absolutely void and cannot be aided by proof alinude.

1 Smith's Lead. Cases, note to Crippen vs. Durden, pp. 991, 992, and cases there cited.

Galpin vs. Page, 18 Wall. 350, 365, 366, 370-372 and cases cited by Field. J.

See also cases under the next sub-point.

II.—Even if the record of such a tribunal does aver the existence of the jurisdictional facts, this averment is only *prima facie* true. The record and judgment may be impeached by a collateral attack and in a defensive attitude or proceeding, by showing that the jurisdictional facts did not exist. This rule applies alike to the decisions *in rem* and to decisions *in personam* between the parties.

1 Smith's Lead. Cases, *ubi sup.* p. 995.

2 Am. Lead. Cases; Note to Mills vs. Duryee pp. 786, 788, 789, 792.

2 Smith's Lead. Cases; Duchess of Kingstons case, pp. 438, 446 (marg. page.)

1 Greenl. on Ev. § 339.

1 Phillips on Ev., pp. 343, 344.

2 Cowen & Hill's Notes; Note 551, pp. 799, 800, 801.

Starbuck vs. Murray, 5 Wend. 148, 158.

Williamson vs. Berry, 8 How. 495, 536, 538, 540, 543.

Holyoke vs. Haskins, 5 Pick 20.

Borden v. Fitch, 15 Johns. 121, 141.

Mills vs. Martin, 19 ib. 7, 33, 34.

Latham vs. Edgerton, 9 Cow. 227, 229

Foot vs. Stevens, 17 Wend. 483, 485, per Cowen J.

Bloom vs. Burdick, 1 Hill, 130, 139–141, and cases cited.

Rogers vs. Dill, 6 ib. 415.

Chemung Canal Bank vs. Judson, 4 Seld. 254, 259, per Ruggles J.

Shumway vs. Stillman, 6 Wend. 447, 453.

Noyes vs. Butler, 6 Barb. 613, 615, 617, per Paige J.

Howard vs. Gossett, 10 Q. B. 359, 451, 453.

Re Goodfellow, 3 B. R. 114.

Thompson vs. Whitman, 18 Wall. 457, and numerous cases cited.

For the convenience of the court I shall quote the language of some of these authorities.

In 2 *Lead. Cas.* 446 (marg. page). Speaking of the general rule that judgments *in rem* are conclusive. Mr. Smith instances a grant of probate or of administration which is *in rem* and is in general conclusive, and proceeds: "It may be "shown that the grant was revoked, or that it was forged, "for that shows it not to be the act of the court at all; or "that it was granted by a court having no jurisdiction, for "there it is a nonentity." He cites *Allen vs. Dundas* (3 T. R. 125), in which, after holding the probate in general conclusive, Mr. Justice Buller says: "This case was com- "pared to the probate of a supposed will of a living per- "son; but in such a case the Eclesiastical courts have no "jurisdiction and their probate can have no effect; their

"jurisdiction is only to grant probate of the wills of *dead* "persons. The distinction in this respect is this; if they "have jurisdiction their sentence as long as it stands un- "repealed shall avail in all other places, if they have no "jurisdiction, their whole proceedings are a nullity."

Prof. Greenleaf, at the place cited, says in relation to the same subject: "But the defendant may show that the "probate itself or the letter of administration is a forgery, "or that it was utterly void for want of jurisdiction over "the subject by the court which granted it, whether be- "cause the person was still living, *or because he had no* "*domicil within the jurisdiction of the court where this* "*is essential*, or for any other sufficient cause." See also the cases cited by Prof. Greenleaf under the section quoted.

Cowen and Hill's Notes, (vol 2 Note 551) contain the following: "Or if the probate was granted by an inferior "court the adverse party may show that the testator left "*bona notabilia*, for then the court had not jurisdiction."

In *Holyoke* v. *Haskins* (5 Pick. 20) the Supreme Court of Mass. held that a grant of administration by the Probate Court of one county, when the deceased was domiciled in another county, was void for lack of jurisdiction, under the statute law of that state regulating the matter of administration, *and that it might be impeached collaterally and by way of defence in a subsequent action founded upon it.* See per Wilde. J., p. 25, also S. C. and S. P. in 9 Pick. 259.

The principle of these citations is directly applicable to the case at bar and is decisive of it. In an action brought by an administrator, when the proceedings of the Probate Court are regular on their face, and the record thereof contains averments of all the jurisdictional facts, the defendant may show by evidence aliunde that some jurisdictional fact did not exist, as, for example, that the deceased was not domiciled in the proper county, or that the testator left *bona notabilia*, and may thus denfensively and by a collateral attack impeach the judgment which was the founda-

tion of the plaintiff's authority. These facts must exist in order to confer jurisdiction; the Probate Court necessarily passed upon their existence, and its record showed such decision. Yet the defendant may contradict that record and destroy its efficacy. These cases I submit cannot be be distinguished in principle from that one at bar, and they fully sustain my position, that the defendants may defensively attack the judgment of the District Court and show the absence of the jurisdictional fact upon which the authority of that court to proceed depends. Certainly the statutory requirment that the deceased must have been domiciled in the proper county is no more important, and does not any more go to the jurisdiction, than the statutory requirement that involuntary proceedings in bankrucy should be instituted by an *actual creditor* of the persons proceeded against. Both facts are necessary to the jurisdiction; both are necessarily involved in the issue; both must be established by evidence; both must be found to exist by the court in rendering its decree establishing the legal status of the bankrupts and their assignee in the one case and of the administrator in the other; and if one may be contradicted in a subsequent action by a defendant when sued by the administrator, upon the same principle the other may be contradicted by the defendant when sued by the assignee of the bankrupts.

I shall add one or two more quotations of a more general character.

In *Starbuck* v. *Murray* (5 Wend., 148, 158,) the action was upon a judgment. The record averred that the defendant had appeared by attorney. Held that this averment was only *prima facie*, and the defendaht might aver and prove by way of defence that he did not appear. The case is decided upon the broad principle that appearance was a necessary jurisdictional fact; and that any fact stated upon the record upon which juaisdiction depends may be put in issue. Marcy, J., establishes this salutary doctrine by reasoning which cannot be answered. He says (p. 158):

"It appears to me that this proposition assumes the very "fact to be established which is the only question in issue. "For what purpose does the defendant question the juris- "diction of the Court? Solely to show that its proceed- "ings and judgments are void, and therefore the supposed "record is not in truth a record. If the defendant had "not proper notice of it, and did not appear in the original "action, all the State Courts with one exception agree in "opinion that the paper introduced as to him is no record; "but if he cannot show, even against the pretended record, "that fact, on the alleged ground of the uncontrollable "verity of the record, he is deprived of his defence by a "process of reasoning that is to my mind little less than "sophistry. The plaintiffs in effect declare to the defend- "ant; the paper declared on is a record because it says "you appeared, and you appeared because the paper is a "record! This is reasoning in a circle. The appearance "makes the record uncontrollable verity, and the record "makes the appearance an unimpeachable fact. The fact "which the defendant puts in issue (and the whole current "of State authority shows it to be a proper issue), is the "validity of the record, and yet it is contended that he is "estopped by the unimpeachable credit of that very record "from disproving any one allegation contained in it. Un- "less a court has jurisdiction, it can never make a record "which imports uncontrollable verity to the party over "whom it has usurped jurisdiction, and he ought not there- "fore to be estopped by any allegation in that record from "proving any fact that goes to establish the truth of a plea "alleging want of jurisdiction. If the jurisdiction of the "court is not impeached it has the character of a record, "and for all purposes should receive full faith and credit."

Cowen and Hills Notes (vol. 2, p. 801) in commenting upon the foregoing case, add the following: "The same "may be said respecting any judgment, sentence or de- "cree. A want of jurisdiction in the court pronouncing "it may always be set up when it is sought to be enforced, "or when any benefit is claimed under it; and the princi- "ple which ordinarily forbids the impeachment or contra-

"diction of a record, has no sort of application to the "case."

I would remark in this connection, and the remark will be applicable also hereafter, that this leading case of *Starbuck* v. *Murray* is not decided upon any ground connected with the fact that the judgment sued upon and attacked was pronounced by the court of another State,—was a foreign judgment. The reasoning of the court is not based upon this special feature of the case, but is general and applies to all judgments, domestic as well as foreign. The very high authority of Messrs. *Cowen* and *Hill* also sustain this doctrine. Some of the cases cited by me are actions upon foreign judgments; but the principles announced by the courts in reference to collateral attack upon such judgments for want of juridiction are universal, and are so distintly declared to be in numerous cases. The proper doctrine seems to be—and it is not necessary for me to maintain anything further—that foreign judgments rendered by courts of general jurisdiction, and domestic judgments rendered by courts of limited and special jurisdiction, stand upon the same tooting. With the judgments of domestic courts of general jurisdiction, we are not at present concerned.

Williamson v. *Berry* (8 How. 495) is a leading case in which this court discussed and stated the whole doctrine with most convincing reasoning and in a most exhaustive manner. Mr. Justice Wayne states the principle in the following language (p. 540): "We concur that neither "order nor decree in chancery can be reviewed as a whole "in a collateral way. But it is an equally well settled rule "that the jurisdiction of any court exercising authority "over a subject may be enquired into in every court, when "the proceedings in the former are relied upon and brought "before the latter by a party claiming the benefits of such "proceedings. This rule prevails whether the order or "judgment has been given in a court of admiralty, chan-"cery, ecclesiastical court, or court of common law, or "whether the point ruled has arisen under the law of na-

"tions, or the municipal laws of States." Citing numerous cases. Also, at p. 543: "The operation of every judg-"ment depends upon the jurisdiction of the court to ren-"der it. Though there may be jurisdiction for certain "purposes in a cause, that jurisdiction may be exceeded "in the judgment. And whenever the right to property "is claimed to have been changed under a judgment or "decree by a court, and it is set up as a defence in an-"other court, the jurisdiction of the former may be en-"quired into."

Finally, this court discussed and re-affirmed the doctrine in a most exhaustive manner, and upon a review of all the authorities in the very recent case of *Thompson* v. *Whitman* (18 Wall. 457). I shall not cite language that must be familiar to this court, but will merely refer to the opinion of Mr. Justice Bradley and the cases cited by him. It is true the judgment attacked in *Thompson* v. *Whitman* was a foreign adjudication, and a portion of the opinion and some of the cases are more directly applicable to judgments of that special character. But at the same time the learned Justice quotes with approval many other decisions which are not confined to such foreign judgments, but which apply the same doctrine to all judgments, domestic as well as foreign, provided at least they are rendered by tribunals of a limited or special jurisdiction. And the argument of Mr. Justice Bradley, taken as a whole, is not confined to the effect of foreign decrees, but is broad and general in its reasoning and in its conclusions. I confidently rely upon this case as a decision establishing conclusively the doctrine and principle stated in the point which I am seeking to maintain.

III.—The doctrine is pushed one step farther. In those special and general statutory cases where the inferior tribunal is obliged to pass and does pass upon the existence of the very jurisdictional facts which must exist in order that it may have power to decide at all, even here its decision is not conclusive upon the question of jurisdiction; the rule stated in the last sub-point, (II.) applies in this instance also. No inferior court can, in the language of

some of the books, make its own jurisdiction by deciding that it exists. The same doctrine applies even in those peculiar cases *where the jurisdictional facts and the facts on the merits are identical.*

1—There are dicta in a very few cases contrary to the foregoing proposition, and which say when the jurisdiction of an inferior tribunal depends upon a fact which such court is required to ascertain and determine by the decision, such decision is final until reversed in a direct proceeding for that purpose.

Brittain vs. Kinnaird, 1 B. & B. 432, (5 E. C. L. R.)
Colton vs Beardsly, 38 Barb. 29, 51, per Rosekrans J.
Wright vs Douglass, 10 Barb. 97, 110, 111, per Gridly J.

The first of these cases has been directly overuled in *ex parte Claffer*, (3 Hill, 460), and in *Broadhead v. Mc Connell*, (3 Barb. 185). The point is not decided in the two cases in 38 and 10 Barbour; the remarks referred to were mere dicta, and the language of Gridley, J. in 10 Barb. was clearly meant to apply to one of the parties to the proceedings, and not to a stranger to it.

2—The doctrine stated by me in the foregoing sub-point III. is sustained by the overwhelming weight of judicial authority.

Cases cited under sub-point II.

1 Smith's Lead. Cas. *ubi sup.* pp. 999, 1003.
Thompson v. Whitman, 18 Wall. 457, 468. (in point.)
Hoffman v. Hoffman, 46 N Y. 30, 33.
Kerr v. Kerr, 41 ib. 272 (in point.)
Harrington v. People, 6 Barb. 607, 610, 611.
Noyes v. Butler, 6 ib. 613, 615, *et seq.*
Clark v. Holmes, 1 Dougl. (Mich.) 390, 397–400.
Sears v. Terry, 26 Conn. 273, 279, 280, 282, 285.
Brown v. Foster, 6 R. I. 576, 577, 578.

In *Hoffman v. Hoffman* (46 N. Y. 30, 33) per Peckham, J.; "It [the judgment record] is not conclusive even "though it states facts which give the court jurisdiction; "but these alleged facts may be shown to be untrue," and

see cases cited by him. This was said in an action *between the same parties*, in which the want of jurisdiction was set up by way of defence.

Kerr v- Kerr (41 N. Y. 272) is directly in point, holding that a judgment may be attacked collaterally and in a defensive manner, by showing want of jurisdiction, even though the judgment record recites all the jurisdictional facts which are made necessary to confer jurisdiction, and upon which the court must hear evidence and which it must decide to exist.

These two cases arose upon divorce judgments, which, more than any other judicial acts, are *in rem*, and fix a personal status. The fact that these judgments were rendered by courts of other states does not affect the general principle, and was not referred to as the ground of decision.

Finally this court has decided the very question in the most peremptory manner in *Thompson v. Whitman*, (18 Wall. 457, 468). Mr. Justice Bradley squarely meets the point and lays down the doctrine relied upon by me in its fullest extent.

Second—An adjudication of bankruptcy, being a decree *in rem* may be impeached by a stranger to it, by his showing either in a direct proceeding, or by collateral attack and by way of defence, that it was obtained through fraud and by imposition on the court.

It is most familiar equity doctrine that a judgment of any court may be attacked and set aside on the ground that it was procured through fraud practiced upon the court by the party promoting the proceedings.

Story's Eq. Jur. § § 252, 252a, 1570, 1575, 1581, 1582, (Redfield's Ed.)

Another writer of high authority says: "It has been "before mentioned that judgments and sentences of courts "of justice, or any other judicial act may be impeached "by evidence of fraud or collusion. * * * A distinc- "tion in this respect has been made between the case of a "stranger, (*who cannot come in and reverse the judg-*

"*ment, and therefore must of necessity be permitted to* "*aver that it was fraudulent*), and the case of a party to "the proceedings; the party himself cannot give evidence "of fraud, but must apply to the court which pronounced "the judgment to vacate it."

1 Phillips on Ev. p 346.

Prof. GREENLEAF, speaking of *foreign* judgments *in rem* and of their general conclusiveness when the court had jurisdiction, adds: "The same rule is applied to all other courts "proceeding *in rem; with the limitation that the judg-* "*ment has been obtained bona fide and without fraud;* "*for if fraud has intervened it will avoid the force* "*and validity of the sentence.*"

1 Greenleaf on Ev. § 541.

Dobson v. Pearce, 12 N. Y. (2 Kern.) 156; See especially pp. 164, 165, opinion of Allen, J. and cases cited.

Third.—Applying these general principles to the case at bar: The bankruptcy proceedings against Harlow E. and Henry S. Macary, and the adjudication of them as bankrupts therein, under which the complainant derives his sole authority, were null and void for want of jurisdiction in the U. S. District Court, because A. T. Macary, the petitioning creditor therein, was not at the time of filing his petition a creditor of the assumed bankrupts.

This proposition embraces two distinct branches, one entirely of fact, and the other of law. I shall consider them separately; and

I. The petitioning creditor, A. T. Macary, was not, as a matter of fact, a creditor of his sons Harlow E. and Henry S. when he instituted the proceedings against them.

The question involved in this assertion is one purely of fact, and it must be determined by an examination of the evidence in the case. I cannot, either in this brief or in my oral argument, discuss the evidence with the exactness and minuteness which the case demands. I can only aid the court by pointing out the important features and portions of it, and by merely suggesting the comments and criticism which should be made upon it. I respectfully

ask the court to make the *careful* examination of the testimony which counsel are unable to present in their public arguments.

The outline of the facts proved and already given, need not be repeated. I shall only dwell upon what took place at Mr. Shipman's office on the afternoon of the 25th of October, 1869, for that is decisive of the question *now* under discussion.

1. Amid all the conflict in the testimony as to what was *said* on that occasion, certain acts were *done* by the assembled parties, certain written agreements and transfers made, which are proved by the witnesses on the part of the complainant as well as by those on the part of the defendants. Unless these *acts* are all disregarded, and these solemn written contracts and transfers are all held to be nullities, there is no possible escape from the conclusion of fact which I have stated above. Whatever may have been the nature of the negotiations between Michaels and the Macary Bros. at Hudson on the preceding days, whatever may have been the legal effect of such arrangement under the requirements of the Bankrupt Act, all this does not change in the least the *acts* done by the parties at Coldwater on the 25th.

What are these facts, therefore, which are thus established or admitted by the complainant's as well as the defendants' witnesses?

The father, A. T. Macary, was assumed to have been a creditor of his sons in the amount of $2,200. Michaels and Levi were creditors for $4,600. By a written bill of sale the Macary Bros. sold and transferred to Louis Sloman their entire stock of goods for $3,482.39 and received the price one-fourth in cash and the rest in notes of the purchaser. This price the Macary Bros. at once paid over to Michaels, and he thereupon gave a discharge in full of the demand of his firm, which was $4,600. At the same time and as an inducement to this sale to Sloman, and this acquittance by defendants, the father, A. T. Macary, executed

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and delivered to Sloman or Michaels a release of *his* demand against his sons, which I copy again as follows:

"Macary Bros., of Hudson, Michigan, (who are my "sons) being desirous of selling their stock of merchan- "dize and goods in said place to Louis Sloman, but the "said Sloman being afraid of their creditors, to confirm "said sale and his title, and in consideration that he "should buy them out, I do hereby acknowledge receipt "in full of all demands against the said Macary Bros. to "this date, Oct. 25, 1869. A. T. MACARY."

Laying aside for the present the testimony of Michaels, Sloman and Shipman, that of Henry S. Macary and of A. T. Macary admits all the above facts; no attempt is made to deny the authenticity of the papers introduced in evidence, so that the execution and delivery of all these instruments is not questioned.

Furthermore, there is no dispute that *all these writings formed parts of one single transaction.* They were not independent acts, but were intended to be mutually related and one to be the support and consideration of the other.

Taking, therefore, these facts alone, it is impossible for the complainant to escape from their force and effect. The release executed by Macary, the father, stands in the case, and it cannot be explained away nor avoided. Its very language tells its own story; it recites the legal request,—states the legal consideration, and contains the release and discharge. It is not a mere receipt which can be explained; it is a contract based upon a valuable consideration, and can no more be avoided or disregarded than any other contract.

There were, in fact, two considerations. One was the purchase by Sloman. The instrument recites this consideration; its legal effect is a request to Sloman to buy, and a promise that upon his buying, and as an inducement to the purchase, the father discharges his demand against his sons. There could not be a more complete and valuable consideration for a promise, especially after the request has been complied with by the actual purchase and payment.

The second consideration was the cancellation in full of all the defendants' demands against the Macary Bros., (and to this should also be added the discharge of the claims of all the other Rochester creditors). It is undeniable that the discharge given by Michaels was based upon the simultaneous discharge given by the father, and the two were intended as supports and considerations for each other. The legal effect of the transaction was, that A. T. Macary said to Michaels, "I will discharge my claims against my "sons if you will discharge yours." If the parties had simply made *promises* to discharge, each would have been a valid consideration for the other. Their acts not being promissory, but executed in the form of present acquitances, the consideration for the release of A. T. Macary is equally valid and complete. As to this consideration see

Sands v. Crooks, 46 N. Y., 564, 569, 570.

There was, therfore, a valid release by A. T. Macary of his entire demand, made upon a sufficient consideration, and beyond all question binding between the parties.

2—*This release is in no way affected by any provisions of the Bankrupt Act. Even assuming that the transfer or payment by the Macary Bros. to the defendants, was an unlawful preference under the act, and made void as against the assignee by* § 35, *this result does not affect the release in question: it is not within the terms nor the intent of the statute.*

Independent of statute no rule of law condemns preference of one creditor by a failing debtor. Except for the Bankrupt Act, the transfer by the Macary Bros. while insolvent of their entire stock in trade to Michaels and Levi, with the express intent to prefer them to the exclusion of all other creditors, even though they had full knowledge of the insolvency and of the intent, would have been perfectly innocent,—a perfectly valid transaction in morals and in law. So also the release by A. T. Macary as one of the creditors would be equally unobjectionable. Now the Bankrupt Act, in § § 35 and 39, condemns such a transfer from the insolvent to the preferred creditor, *as against*

the assignee, but not as between the parties themselves. As the provisions are highly penal, they are not to be extended by construction to any transaction not within their express language. While the very transfer itself is avoided as against the assignee, so that he can recover the goods or their value, no other kind of contract even of the debtors is avoided, and *a fortiori no collateral contract made by a third person.* It is a monstrous perversion of this highly penal statute to say that because it avoids a transfer or payment by an insolvent debtor, so that the assignee may recover the goods or their value for distribution, it also avoids a contract or release made by another creditor of the insolvent, which is neither within the terms nor the reason of the statute.

Granting, therefore, for the present that the transfer or payment to the defendants is within the provisions of § 35 and forbidden by them, the release of A. T. Macary is untouched; based upon a sufficient consideration, and legally binding upon the parties, it remains valid and binding. Its consideration was not made illegal by the statute, because the sale to Sloman was confessedly valid between the parties to it, even though it may be avoided by the assignee, and the discharge given by Michaels is of course valid and binding.

The conclusion thus reached is, that A. T. Macary's release, undoubtedly good, were it not for the Bankrupt Act, is unchanged in its legal character by any provisions of that statute.

3—There is another view of the transaction, but still based upon the testimony of the Macarys rather than upon that of the defendant's witnesses. The testimony concedes the execution and delivery of the release by A. T. Macary. It attempts, however, to limit the effect of the acquittance, by the pretended declaration of Michaels which it claims accompanied such execution and delivery. The utmost force and effect which can be given to this testimony is, that the release by the father was given under a promise by Michaels that the business should be conducted thereafter by the sons as it had been before.

The effect of such a fraudulent scheme upon the claims of the father who is thus made a participant in it, will be discussed under another point. I now speak simply of the effect upon the validity of the release. Assuming that Michaels did make such a promise, the breach thereof did not render A. T. Macary's discharge a nullity. If Michaels did not keep his promise, the failure to do so may perhaps render him liable to an action (if the promise was legal) but does not destroy the efficacy of the father's release which was given, as already shown, upon another consideration.

4—My argument thus far has been founded upon the account of the transaction given by the two Macarys, but I prefer to rest the decision of the question of fact under discussion upon the account given by the defendants.

I shall, in a subsequent point, analyze the whole testimony of the Macarys, and show its palpable contradictions and patent untruths. That criticism must also suffice for the present point. Between the story told by the two Macarys, and that told by the defendant's three witnesses as to the interview in Mr. Shipman's office, there is an irreconcilable contradiction. If one is true, the other is not mistaken, it is false.

Of the direct interest of both the Macarys father and and son, I shall speak in the sequel. Michaels is also interested, and his testimony must be carfully scrutinized. Sloman is without interest in the event of this action; he can be neither benefited nor injured by its decision. His testimony and that of Michaels agree in every particular. But I call especial attention to the testimony of Mr. Shipman. Not a suggestion of interest or bias can be made against him. He corroborates Michaels and Sloman completely; shows that A. T. Macary intended to release and surrender his demand absolutely; that he was repeatedly questioned as to his intention, and that the paper was read over to him more than once. I ask from the court a careful attention to Mr. Shipman's testimony in relation to the whole transaction in his office, and beg that your Honors will compare his version with that of A. T. and Henry S.

Macary. There is no room to explain the discrepancy by any suggestion of a failing memory; either Mr. Snipman or the Macarys prevaricate and falsify; which of them is it likely to be?

The release itself fully sustains the account given by the defendants; it recites the sale to Sloman, consents to it, legally requests it, and discharges all the father's demands against his sons. It is enough for me now to say that the account given by the Macarys is utterly inconsistent with the terms of the instrument as well as with the testimony of Michaels, Sloman and Shipmau.

The conclusion is, that on the 25th of October A. T. Macary fully, legally and finally, surrendered and released all his claims and demands against his sons, the Macary Bros., and was not thenceforth, nor at the time of his filing the petition in bankruptcy against them, their creditor.

II.—The fact that the petitioning creditor *is* an actual creditor of the intended bankrupts, is a jurisdictional fact; it goes to the jurisdiction of the District Court to entertain the proceedings: and the absence of this fact is fatal to the validity of the adjudication and all that has been done under it.

1—This is not the case of a court of general jurisdiction, or of jurisdiction over *all cases*, e. g. arising out of contract where the court acquires jurisdiction over the person by the service of process, and has jurisdiction *over the whole subject matter* either by virtue of the common law or by statutes creating the court. In such a case the fact of the plaintiff having a valid claim against the defendant is not jurisdictional; the claim is the *mere cause of action* in the particular case, and the court has power to hear and decide *all such actions.*

But even courts of general jurisdiction may have some special and statutory authority conferred upon them and in such case the steps prescribed by the statute must be strictly complied with or else the proceedings are *coram non judice.* This subject, which has an important bear-

ing upon the general doctrine under discussion, has lately been examined at length by this court, and I need only refer to its opinion.

Galpin v. Page, 18 Wall. 350, 370-372, per Field, J.
Christie v. Unwin, 3 Perry & Davison, 208, per Colridge, J.
Morse v. Presby, 5 Fost. [N. H.) 302.
Freeman on Judgments, § 123, and cases cited.

2—This is a case where the jurisdiction depends entirely *upon the nature of the subject matter*, so that if the particular subject matter of a given litigation does not fall within the required class, the proceeding is not merely erronous, but is absolutely *coram non judice* and void.

It is not necessary to maintain the position that the U. S. District Courts are, in respect to their entire scope of judicial authority, tribunals of inferior and limited jurisdiction in the strictest sense of that term. We are not concerned with the nature and powers of these courts in general, we are only concerned with their special jurisdiction in Bankruptcy.

Even if the Districts Courts were tribunals of general jurisdiction in respect to their ordinary powers, their authority in bankruptcy clearly fails within the principle announced by the Supreme Court of the U. S. in Galpin v. Page, and referred to in a preceding paragraph.

The District Court has no inherent bankruptcy jurisdiction; all authority over the subject matter is both created and conferred by statute. The statute prescribes when and in what manner involuntary proceedings may be instituted, and if a given proceeding does not comply with the statutory requirements the District Court has no authority to entertain it, and all acts of the court would be a nullity.

It is not every debtor that can be made a bankrupt, *and it is not every person that can institute bankruptcy proceedings.* The party instituting must bring himself within the statutory requirements *not only in form but in fact*, or else the very foundation of the proceeding fails. No one but a creditor can institute the proceedings, and even

this creditor must hold a demand amounting to $250. [*Note:* I am describing the statute as it stood prior to the recent amendments which do not affect the case at bar]. A creditor for $200 only has no more power to set the judicial machinery in motion than a person not a creditor; and the District Court would have no authority in either of the supposed cases. One fact must exist—one fundamental and jurisdictional fact—before the tribunal can act under the provisions of the statute, namely, *the party prosecuting must be a creditor to the amount of at least* $250.

The case is analogous to that of a court of Probate in a given county, which, by the statutory law of some state is authorized to appoint an administrator when the deceased was domiciled in that county. As has been shown by writers and decisions of the highest authority, the fact of proper domicile is a jurisdictional fact, and a decree made by a Probate Court of a county in which the deceased was not domiciled is not simply erronous, it is *coram non judice*, and may be attacked in a subsequent action by showing the absence of the required jurisdictional fact. It cannot be pretended that there is any substantial difference between the two statutory requirements in these two cases, the domicile of the deacased in the one, and the relation of creditor in the other. It is impossible to suggest two cases more completely analogous, and more evidently falling within the same principle.

There is a simple and plain test of this position. Suppose the petition in involuntary bankruptcy should show on its face that the demand of the petitioning creditor was only $200, and that the proceedings thereon had gone on to an adjudication ; such proceedings and the adjudication would confessedly be void on the face, because they would disclose the absence of the fundamental jurisdictional fact.

Conceding this concedes my position. The proceedings in the case assumed are void on the face for lack of jurisdiction. What does this mean? It means that in any

other subsequent action, based upon such proceeding and adjudication, *no evidence would be needed to show the want of jurisdiction because that want would appear by mere inspection.*

In the present case there is the same want of jurisdiction, the same absence of the very jurisdictional fact, only that want, that absence does not appear on the face of the proceedings themselves, is not disclosed by mere inspection. The overwhelming array of authorities cited in the former part of my argument, establishes the doctrine that in cases like the present, of special statutory judicial proceedings, this want, this absence of the jurisdictional fact may be ascertained and proved by extrinsic evidence. It has been proved by the evidence beyond all possibility of contradiction.

There is little direct authority to be found in the reports upon the very point under discussion. In our case, however, a very able and learned judge supports by reasoning most convincing the position which I maintain, and I shall quote his language in full. The proceeding was upon a creditor's petition, and after reciting § 39 of the Act, Mr. Justice WOODRUFF says: "To the maintenance of the petition *or to give the petitioner any standing in court*, several "things must concur; the petitioner *must be a creditor; the* "*debt due to him must be provable under the act;* and the "amount thereof must be at least $250, unless all these "concur, he has no right to prosecute the petition, and, "however he may be able to prove and does prove the "acts of bankruptcy, he is not by the law clothed with the "rights or power to begin or sustain a prosecution or ask "a decree. * * * The *objection goes not only to the* "*disability of the petitioner, but to the jurisdiction of* "*the cause*, and this should be so. It would be monstrous "injustice if parties were not only liable to be proceeded "against, but must necessarily be adjudged bankrupt and "dispossessed of all their property at the instance of *any* "*one and every one, who either dishonestly or by mistake* "*was able to present a petition and affidavits prima* "*facia* evidence of a debt when in truth none existed.

Re. Cornwall, 6 R. B., 305, 311, per Woodruff, J.

This language is peculiarly applicable to the present case. It in the opinion of the learned Judge, it is monstrous injustice to subject the bankrupts themselves, who have notice of the application and an opportunity to appear and defend, to the liability described, *the injustice is doubly monstrous when perpetrated, as in the case at bar, against persons who are not parties to the bankruptcy proceedings, who had no notice of it, and no opportunity nor power to come in and deny the truth of the petition filed with the consent of if not in actual collusion with the bankrupts, and whose only legal notice or knowledge of such proceedings was the commencement of this suit in equity against them by the assignee.*

Unless my position is sustained, this court will give its sanction to the acts of a creditor who had a few days before realised his claim in consideration of a transaction in which our claim was also released, commencing a bankruptcy proceeding against his former debtors—they consenting—and alleging in his petition the falsehood that he is a creditor, for the sole purpose of laying the foundation for a suit against us, and our mouths are stopped to protest against this iniquity, our hands are tied up from any attempt to resist it. I submit that the Bankrupt Act was not passed for the purpose of permitting such a wrong.

Fourth.—The bankruptcy proceedings and the adjudication therein under which the complainant derives his sole authority, were also null and void, because they were instituted and obtained through a gross fraud of the petitioning creditor, A. T. Macary, and by means of his wilful concealment of the truth from the District Court and his imposition upon it.

It is elementary doctrine that equity will grant relief to the injured party even aganst a fraudulent judgment, by entertaining a suit on behalf of such party to set the judgment aside. For illustrations of this doctrine and various circumstances in which it has been applied, see

Freeman on Judgments. §§ 489, 491, 492, 493.

The same writer states the rule as to collateral attack upon judgments on the ground of fraud, in the following manner: "It is only third persons who have the right to "collaterally impeach judgments. They are accorded the "right because not being parties to the action, nothing "determined by it is to them *res adjudicata*. The rule "is correctly stated in Cowen, Hill and Edwards' Note 291 "to Phillips on Evidence, as follows: 'Judgments of any "'court can be impeached by strangers to them for fraud or "'collusion.' It must not, however, be understood that *all* "strangers are entitled to impeach a judgment. It is only "those strangers who, if the judgment were given full "credit and effect, would be prejudiced in regard to some "pre-existing right that are permitted to impeach the judg-"ment. Being neither parties to the action, nor entitled "to manage the case nor appeal from the judgment, they "are by law allowed to impeach it whenever it is attempt-"ed to be enforced against them. *Whenever a judgment "or decree is procured through the fraud of either of "the parties, or by the collusion of both*, for the purpose "of defrauding some third person, he *may escape from the "injury thus attempted by showing, even in a collateral "proceeding, the fraud or collusion by which the judg-"ment was obtained.*"

Freeman on Judgments, §§ 334, 335, 336.
Atkinson v. Allen, 12 Vt. 619.
De Armond v. Adams, 25 Ind. 455.
Hackett v. Manlove, 14 Cal. 85.
Hall v. Hamlin, 2 Watts, 354.
Sidensparker v. Sidensparker, 52 Me. 481.
Crosby v. Leng, 12 East, 409.
Lloyd v. Maddox, Moore, 917.

Beyond a doubt at least all the grounds of fraud which may be set up and relied upon by a party to the fraudulent judgment, in a direct suit in equity brought to set aside the former adjudication, may be alleged by a person not a party who is permitted to impeach the judgment by collateral attack. The cases in equity in which judgments have been set aside for fraud, furnish, therefore, examples and precedents for impeaching a judgment collaterally.

The various grounds of fraud may be reduced to concealments of the truth, and affirmations of falsehoods. If a party conceals from the court facts which if known would have prevented the court from rendering the judgment, or if he imposes upon the court by actual false statements and procures the determination by means thereof, the case is brought within the operation of the doctrine which I have invoked. The decisions which I have cited above, and those referred to by Mr. Freeman in the sections above quoted, fully sustain the position.

I shall show that both the conditions exist in the case at bar. In procuring the adjudication of bankruptcy A. T. Macary was guilty both of fraudulent concealment, and of positive false misrepresentations; and added to these, the tesitimony given by the three Macarys on their cross-examination, makes it clear that there was collusion between the petitioner and the bankrupts.

I. It was a gross fraud on the court for A. T. Macary to conceal the release and discharge of his demand which he had executed, and to represent that he was a creditor of his sons at all.

The release was given Oct. 25th, 1869, and the petition was sworn to Nov. 13th, 1869. The deposition as to his claim was made by A. T. Macary himself, and represents this very debt as still justly due and owing him from the alleged bandrupts.

I need not enlarge upon this point. If the Bankruptcy Court had been informed of the facts as they now appear from the testimony of A. T. Macary, aloue, it would have at once dismissed his petition; there can be no pretence of the contrary. It is impossible to conceive of a more outrageous instance both of concealment and of affirmative false representation than this.

II.—A. T. Macary was guilty both of fraudulent concealment and representations in his allegations and proofs respecting the chattel mortgage given by the Macary Bros. to Mowrey & Co.

The petition charges two acts of bankruptcy in different forms: (1,) the chattel mortgage to Mowrey & Co., and (2,) the transaction with Michaels & Levi and Sloman. It charges that when the mortgage was given the Macary Bros. were insolvent, and that it was given with the intents condemned by the Act. This was sworn to by A. T. Macary, Nov. 13, 1869.

In the face of all this, A. T. Macary testifies in reference to the same mortgage, that he believed his sons to have been solvent when they executed this chattel mortgage. He further testifies, on his cross examination: *I did not at that time believe that my sons, in the execution of the mortgage, intended to commit a fraud upon their creditors, and to evade the provisions of the bankrupt act, I don't believe so now.*"

Deposition of A. T. Macary, p. 13, fols. 45, 46.

It is true that on his re-direct examination the complainant's counsel gets the father to modify his answers some in respect to the *solvency*, but he makes no change or retraction in his statements in respect to their intent. The counsel's questions by which this modification is procured, are so palpably leading, that I submit they and the answers to them should be disregarded.

Deposition of A. T. Macary, p. 14, fol. 48.

The result is that A. T. Macary charged an act of bankruptcy which he now admits to be false. The wrongful intent of the sons to give a preference, or to commit a fraud on the act, are a necessary element in the act of bankruptcy; they were, therefore, alleged, and proof was offered by A. T. Macary in his preliminary deposition. He now admits in the most positive manner, without any reservation, *that he did not believe at the time that his sons had any such intent, and does not believe so now.* His allegations in the petition were thus, by his own sworn acknowledgement, wilful concealments and misrepresentations of the truth. The

same is true of his averments in respect to the solvency of his sons. But if the court should think that by his answers to the counsel's leading questions, he has retracted his statements as to his sons' solvency, there is no pretence that he has done so in respect to their wrongful intent.

Again, it should be noticed that this mortgage was not given to Mowrey & Co. for a firm debt. It was given for a debt incurred by Henry S. Macary in his individual tobacco business. This debt was put into the form of four notes, signed by the brothers individually and not by the firm. The chattel mortgage was given to secure these notes. The petition, nevertheless, represents the debt and mortgage as purely firm liabilities.

Deposition of Harlow E. Macary, p. 19, fol. 62.
Deft's Ex. "C," p. 69, fols. 200, 201.
Petition in bankruptcy, pp. 89–92, fols. 249–251.

Finally, the evidence shows conclusively that the mortgage was legally destroyed and cancelled before the petition was filed. It appears by the uncontradicted testimony of Sloman, and by the assignment offered in evidence, that on the 11th November, 1869, Mowrey & Co. assigned his demand and the chattel mortgage to Sloman, who thus became absolute owner thereof. As Sloman had the legal title to the goods on which the mortgage was given, the mortgage of course was immediately merged and ceased to exist as a lien on the 11th November. The result is that Mowrey & Co. had ceased to be creditors of the Macary Bros., and the chattel mortgage itself had ceased to exist before the petition was sworn to on the 13th of November. The particular act of bankruptcy charged, did not therefore in any way exist when the petition was sworn to and filed.

Deposition of Sloman, p. 41, fol. 124, 125.
Deft's. Exhibit "C," pp. 69, 70, fols. 200, 201.

III.—The petioning creditor was guilty of the grossest fraudulent concealment and misrepresentations in

all his averments and proofs relating to the transaction with Michaels & Levi and Sloman on the 25th October, 1869.

I ask special attention of the court to this particular point, for it is entirely based upon the testimony given by the complainant's witnesses, and takes the version of the transaction given by the Macarys as correct.

The petition of A. T. Macary charges this transaction in several forms as a transfer to Sloman, and to defendants, with the various intents made unlawful by the statute.

See petition, pp. 89–92, fols. 251–257.

The preliminary deposition to this act of bankruptcy is made by A. T. Macary, and I ask particular attention of the court to its statements and to the account of the transaction which it gives, *and which are all falsified by the evidence given by the same person in the present suit.*

See said prelm. dep., pp. 94, 95, fols. 265–267.

It proposes to give the transaction on Oct. 25th, and describes the petitioner as a silent witness thereof; it conceals all the part which he himself took in the affair, and misrepresents that taken by the others. It does not pretend to state the objects of the transfer, nor hint at the release given by himself; it describes the transfer as a naked sale of the goods to Sloman and a naked payment of the price thereof to Michaels.

1. *A. T. Macary was upon his own showing and that of his son a particeps criminis in all and any frauds which were committed or attempted by Michaels acting for the defendants, either upon the bankrupt act or upon other creditors.*

The theory of the complainant is that Michaels committed a fraud upon the act and upon other creditors. A. T. Macary and Henry S. Macary attempted to sustain this theory, but in doing so they both make the

father an active participant in all and any wrong that was done.

It is impossible to escape from this conclusion. I cannot quote the depositions, but they tell the following story: There was a simulated sale to Sloman for the express purpose of enabling the Macary Bros. to carry on the business exactly as they had done before, under the guise of a pretended ownership by Sloman; all the other creditors were to be kept at bay by this means; the sons were to buy of defendants as they had done, and were to have their living out of the business; A. T. Macary was informed of all this; says he knew this design; took a part in it; assented to it; and gave a release of his own claim in order to help it along, which release he now insists was a mere sham and falsehood.

I must refer the court to these depositions at large. I will, however, quote one choice morsel from A. T. Macary's testimony: describing the transaction of October 25th, he says: "I understood that Michaels was making the purchase. The object was as I understood it that Michaels & Levi should get their pay out of the boys. I consented to it under the conditions that if I would give this receipt, he would take the stock, and the boys should do business in Sloman's name, and that goods should be ordered in Sloman's name, who was to order the goods for the boys. I suppose the object of having the boys do business in Sloman's name, was to keep the other creditors from coming on them."

Deposition of A. T. Macary, p. 11, fol. 40.
" " pp. 8–11.
" Henry S. Macary, pp. 24–37.

The sum of the whole matter is: A. T. Macary, on his own showing is an active participant in a scheme to defraud the creditors of his sons, and to prefer the defendants. He lends it all the aid he can by discharging his claim. The scheme is consummated. A few days after he files a petition in bankruptcy claiming to be a creditor, and alleging this very scheme as the act

of bankruptcy, taking great care, however, not to divulge any of the *real* facts.

I simply ask, if all the facts which A. T. Macary testifies to in the present case, had been laid before the District Court, would that court have granted the adjudication upon his petition? If not, then there was fraudulent concealment and misrepresentation which vitiates the judgment which that court did pronounce.

2. A peculiar emphasis is given to the foregoing conclusions from the patent fact that the bankruptcy proceedings were instituted for the immediate and direct benefit of A. T. Macary, and to lay the foundation for the present suit against Michaels & Levi, in which suit he is the real party in interest.

The list of creditors contained in the schedules filed by the bankrupts and that of the creditors who have proven their claims, shows the nature of the original proceeding and of this suit. None of the important creditors named in the schedules have proved their claims except A. T. Macary. The Rochester creditors have been all settled with. Mowry & Co. were paid off by Sloman; the defendants were not put in the schedules. Of the four creditors who proved their claims, and whose demands were really on account of the firm business, one is for $93, another $84, and the others $36, and $31.

Page 72, fol. 207.

There is not a firm creditor unsettled with who could have instituted bankruptcy proceedings. A. T. Macary is therefore the person who is directly benefitted by the original proceedings and by this suit. He testifies: "I have secured the assignee against cost in this suit, and signed an agreement to that effect, by which I assume all responsibility of this case."

A. T. Macary's deposition, p. 11, fol. 42.

The bankruptcy proceedings and this suit are there-

fore, in reality a means by which A. T. Macary is trying to collect his demand out of the defendants, and he is the real party in interest.

Again, it is patent upon the cross-examination of the Macarys' father and sons, that the bankruptcy proceedings were instituted solely to lay the foundation for an attack upon the defendants. I cannot dwell upon the testimony, and merely refer to the depositions at large. Sloman replevied the goods on Monday, November 1. The negotiations with the lawyers commenced at once. Why was the replevin suit suffered to go by default? Why did the Macarys not contest that action, and proceed for the goods? If this story is true, they could have maintained possession of the goods as against Sloman. It is plain that the design was to prosecute Michaels & Levi from the beginning.

3. To all these frauds on the part of A. T. Macary is to be added the palpable fact of collusion between him and his sons. No reasonable man can read the cross-examination of the father and the two sons, and not be convinced that the bankruptcy proceedings were arranged between them, and the boys gave all the aid they could in the matter.

Here again I must refer the court to the testimony at large, and cannot comment upon its detail.

See deposition of A. T. Macary, pp. 11–14.
" Harlow E. Macary, pp. 18, 19, fols. 61, 62.
" Henry S. Macary, pp. 34–36, fols. 104–110.

I must notice, however, one point. There is a conflict between these witnesses themselves. The father admits that the sons went to the lawyer's office, and were examined as to the facts, and his admissions are beyond all doubt true, though probably not all the truth. The sons, or at least one of them, in his eagerness to swear strongly, denies *in toto* what his father had admitted. This discrepancy is only one among a great many which will appear on reading the testimony of these witnesses.

The conclusion of fact from all this evidence given by

the Macarys themselves is: A. T. Macary consents to this fictitious sale by which his sons' ownership would be concealed under that of Sloman, and makes this arrangement a condition of his giving his consent and signing a discharge of his own demand, and avows without a blush that all this was done to cheat other creditors;—this man, without whose co-operation the scheme which he thus describes could not have been perfected, a few days after institutes bankruptcy proceedings based upon this very fraudulent transaction, procures the appointment of an assignee, indemnifies that assignee, and assumes all the responsibility of the present suit which is brought to reap the fruit of his own fraudulent acts. Nay further, the bankruptcy proceedings thus instituted are brought for the sole purpose of attacking persons who were not parties to them, had no notice of them, much less to oppose them or show their fraudulent character.

Finally, if this suit is successful this man A. T. Macary, will, out of the money recovered from us, be paid in full principal and interest the demand which he thus released and discharged, and a considerable balance will be left to go into the pockets of his sons who were his confederates in the swindle which will thus be brought to a successful issue by means of the determination of this court.

Such a conclusion is not a pleasant one to contemplate in a Court of Justice, and I feel confident that this High Tribunal will not aid in its attainment. I misunderstand the doctrines of equity as here administered, if your Honors shall affirm the decree which I have shown enables the actor in a fraudulent scheme to be rewarded for his own fraud. The Bankrupt Act was intended to work justice and establish equality, and its provisions to that end are severe and penal. In this suit the Act is invoked solely to sustain a fraud, and I venture to say that no such barefaced outrage upon the processes of justice was ever before brought before a court.

Fifth.—The provisions of the Bankrupt Act, when rightly construed, are not opposed to the foregoing posi

tions, nor do they cut off the power of enquiring into the legality of the adjudication in bankruptcy and of the assignee's appointment and authority.

The only provisions which relate to the matter are in §§ 14 and 15. Section 14 enacts that an assignment shall be made by the Register or the Judge to the assignee, which shall pass the title to the bankrupt's property to the assignee. Then follows this clause: "A copy duly certi- "fied by the clerk of the court under the seal thereof, of "the assignment made by the Judge or Register to him as "assignee, shall be conclusive evidence of his title as such "assignee to take, hold, sue for, and recover the property "of the bankrupt." Section 16 authorizes generally the assignee to bring such suits as the bankrupt could have brought, and also to prosecute in his own name any suits which may be pending in the name of the bankrupt; and closes thus: "In suits prosecuted by the assignee a cer- "tified copy of the assignment made to him by the Judge "or Register shall be conclusive evidence of his authority "to sue."

The 16th section does not apply to suits like the one at bar. It is in terms confined to such actions as the debtor might maintain in his own name, and the "authority to sue" spoken of is only the authority to maintain such actions. If the words "authority to sue" in this section are deemed broader in meaning than the corresponding phrase "title to take," &c., in § 14, they do not include the authority to maintain an action like this which the bankrupt could not have maintained.

The more general language in § 14, which embraces an action like the one at bar, means exactly what in terms it says: The assignee's *title* is made good;—that is, the assignment from the Register is a good *title* although the bankrupt did not join in the conveyance; as such title it operates to transfer the property to the assignee, and a certified copy thereof cuts off all enquiry in that particular direction. The word "title" is used several times in § 14 in other clauses, and clearly in the strict technical sense which I have given to it.

If the complainant's construction of this clause is correct, and it is conclusive evidence of the *validity of his appointment*, then it is an absolute bar to all enquiry of the kind in any sort of proceedings, on a motion to set aside the adjudication, and even an action of equity brought for the same purpose. The language of the section is general and sweeping and does not admit of any exceptions; the conclusiveness—if it be such as is claimed—is not limited to one sort of judicial proceedings, and would I submit be equally effectual on an appeal from the adjudication itself. The necessary result would be, that *if a person in any manner, by any fraud, or purjury, or official malfeasance, procured a certified copy of an assignment to himself, there would be no possible way of attacking it collaterally or directly; for it is not the adjudication, which is made conclusive, nor the assignment even, but simply a certified copy of the assigument.*

This is a legitimate *reductio ad absurdum*, and shows that the statute does not admit of the construction which I am opposing.

The true interpretation is plain, simple and just. When the proceedings in bankruptcy are regular and valid, when the adjudication is legal, the statute makes the certified copy of the assignment conclusive evidence of the assignee's *title;* he need not produce the original assignment which is on file in the Clerk's office, and perhaps he need not prove the proceedings up to the making of the assignment. But the clause does not affect the validity of the assignment itself, and especially does not close the question of jurisdiction. The Legislature could never have intended the monstrous injustice of abrogating the elementary rules which regulate the vaidity of judgments, and permit them to be set aside or avoided for want of jurisdiction or for fraud.

SECOND POINT.

On the merits the case alleged by the complainant in his bill has been disproved; the defendants are not within

the provisions of the thirty-fifth and thirty-ninth sections of the Bankrupt Act, and the bill should be dismissed.

First.—The general construction of the 35th and 39th sections. The general interpretation to be given to these sections has been settled by repeated decisions. In order that the assignee may recover money or other assets transferred to a creditor by the bankrupt, all of the following elements of the right of action must co-exist: (1) the transfer must have been within four months of the filing of the petition; (2) the debtor must have been insolvent; (3) his intent must have been to give the creditor a preference, or to commit a fraud on the Bankrupt Act; (4) the creditor must have had at the time reasonable cause to believe the debtor insolvent; (5) the creditor must also have had reasonable cause to believe that a fraud on the provisions of the Bankrupt Act was intended by the transaction.

Toof v. Martin, 13 Wall., 40, 46, per Fie ld, J.
Kohart v. Hoguet, 5 B. R. 159.

If the transfer was not in the usual course of business, this is *prima facie* proof of the existence of the intent and and knowledge, and the burden of proof is thrown upon the creditor receiving the transfer. But this *prima facie* presumption may be rebutted, and the creditor's innocence of the wrongful intent and knowledge may be shown by satisfactory evidence.

In not a few of the reported cases, certain of the Judges in the primary Bankruptcy Courts have been too eager in applying the stringent provisions of the statute. They have seemed to regard creditors who were simply seeking to be paid an honest debt, as persons guilty of some great moral turpitude who ought to be punished for their crimes. They have forgotten that, independent of this statute, the endeavor to secure a demand, or even to obtain a preference, is a perfectly innocent act, and one which the law favored, and equity did not forbid. The provisions of §§ 35 and 39 are in the highest degree penal. A creditor under their operation may forfeit claims to an unlimited amount. Guilty of no act

which any statute or any principle of morality calls a crime, he may incur a sweeping forfeiture for exceeding in amount the fines which are imposed upon persons who have committed aggravated misdemeanors. While these provisions are doubtless a necessary part of the system, the courts should be careful not to wrest them from their rightful place and office, and make them the means of doing injustice.

This high tribunal has, however, adopted a construction less harsh and more in accordance with private rights of property and of contract. *The intent to give a preference or to commit a fraud upon the act, must be an existing present thought and conception of the mind,—a present design formed in the mind and acted upon, and must be established as a fact by evidence directly tending to show its existence. The doctrine of constructive legal intent inferred as a necessary consequence from certain outward acts, without reference to the actual thought and design of the party, and of a distinction between this legal statutory intent and actual motive,—this doctrine which was so earnesely advocated and enforced by many of the bankruptcy judges, has been finally repudiated by this tribunal of last resort.* This, I submit, is the principle of construction upon which the recent decisions of the Supreme Court are based.

Wilson v. City Bank, 17 Wall, 473, 483-488.
Cook v. Tullis, 18 Wall, 332, 337.
Tiffany v. Boatman's Institution, 18 Wall, 375, 388
Toof v. Martin, 13 Wall, 40, 48.
Wager v. Hall, 16 Wall, 584, 602.
Tiffany v. Lucas, 16 Wall, 410.

Second.—The necessary elements of this intent and the knowledge thereof. In order that there should be the intent to prefer one creditor or to commit a fraud upon the act by a transfer or payment to such creditor, there must necessarily be in fact other creditors who are not satisfactorily provided for, *and the creditor to whom the transfer is made, must know or must have reasonable grounds of believing that there are such other creditors, and that they are not satisfactorily provided for by the debtor.*

I. If there was but one creditor in fact, no payment to him by an insolvent could of course be a preference. So if the creditor, after using all reasonable means to obtain accurate information, failed to learn that there were other creditors besides himself, and actually upon such reasonable information believed that he was the only one, and thereupon received a payment or transfer from his debtor, whom he knew to be insolvent, he would not be amenable to the penalties and forfeitures of the 35th and 39th sections.

The discussion of this proposition is combined with that of the next following sub-point, (II). The doctrine has been fully sustained and applied by an able judge in

Wadsworth, Assignee v. Tyler, 2 B. R. 101.

The assignee brought trover for the value of property transferred by an insolvent debtor to the defendant, a creditor. The trial was by the court—Mr. Justice Shipman (late U. S. District Judge in Conn). He found that the debtor was insolvent *and the defendant knew it*, but at the same time that defendant had no reasonable grounds for believing that a fraud upon the act was intended by the transfer. Although the evidence is not reported in full, it is plain that the case was in principle the same as the one at bar, and it fully maintains my proposition. Judge Shipman puts his decision expressly upon the ground that *the defendant did not know there were other creditors besides himself*. It was conceded that the transfer was *prima facie* a fraud upon the act because out of the usual course of business, but this presumption had been overcome. The judge says that *there was no proof that the defendant had any knowledge of other claims or the extent of them. He* thus appears to have rested upon the absence of such proof against the defendant, and not to have required affirmative proof of his own ignorance by the defendant in order to overcome the presumption.

II.—We may go one step farther. If a creditor, who knew that there had been other creditors besides himself, after using reasonable diligence in seeking information,

should be informed in such a manner that he would act in a prudent and business-like manner in relying upon the information, that all the other creditors had been settled with or compromised with to their satisfaction, and should rely upon such information and thereupon accept a payment or transfer from the debtor whom he knew to be insolvent, he would not be amenable to the penal provisions of the 35th and 36th sections.

The truth of both the foregoing propositions (sub-points I. and II.) is implied in the very notion of the knowledge positive or conditional, or the reasonable cause for believing, that a fraud upon the act was intended, spoken of in the statute. This fraud consists simply in the prevention of or interference with the forced equality of payment to creditors which the statute contemplates: it does not consist of any payment to creditors, equal or unequal, *consented to by all*. In other words, if all the creditors agree to take payment *pro rata* or otherwise and to be satisfied therewith, no fraud upon the act is committed.

When, therefore, the statute speaks of knowledge on the part of a creditor, or of reasonable cause for believing on his part that a fraud upon the act was intended by a transferee or himself, it necessarily implies that either he knows of the creditors, or has reasonable cause to believe that there are other creditors who will be deprived *against their consent* of their share of the assets by means of such transfer. This is the very essence of the statutory notion of a preference, and of a fraud upon the act thereby.

It follows, therefore, that if the supposed creditor had reasonable grounds, as a fair and honorable business man, of believing that *all the other creditors of the insolvent had been settled with to their satisfaction*, neither knowledge nor belief, nor reasonable grounds of belief that a preference or himself or a fraud upon the act was intended by the debtor, could be imputed to him.

This doctrine has also been maintained and applied by many of the ablest and most experienced Judges in

Warren, Assignee v. The Town, Nat. B'k, 6 B. R. 479.

The action was in Equity, similar in its object to the one at bar. The facts and opinion are too long to be quoted. The evidence showed that the insolvent debtor had compromised with other creditors, and the bank, *after making inquiry, supposed that all other creditors had been thus settled with and satisfied;* but this supposition turned out to be a mistaken one. The court dismissed the bill on the ground that, notwithstanding all *prima facie* presumptions raised by the statute, the defendant had shown that it did not have reasonable cause to believe that a fraud on the act was contemplated by the transfer to itself. The decision is put precisely upon the ground I have maintained in this point. I quote a sentence from the opinion of Mr. Justice Blatchford at p. 483: "Notwithstanding the provisions of § 35 that if the challenged transfer or conveyance is not made in the usual course of the business of the debtor, the fact shall be *prima facie* evidence of fraud, I do not see in this cause any satisfactory evidence that the bank had any reasonable cause to believe that the debtor intended by the transfer to give the bank a preference. * * * *It does not appear that at the time of the transfer the bank had reasonabe cause to believe that there were any creditors not compromised with, and over whom it could obtain a preference. What transpired after the transfer was made cannot affect the right of the parties. The question is as to what the bank had reasonable cause to believe at the time the transfer was made.*" This whole case is instructive, and many of the facts were quite analogous to those of the cause at bar.

III.—There is still another step. If the creditor, even knowing his debtor to be insolvent, after using reasonable means to obtain accurate information, ascertains that there are certain other creditors besides himself, and learns in such a manner that it is a reasonable act of trust for him to rely on the information, that these are all the other creditors, and under such circumstances takes a transfer of money or other assets to himself and by the very terms of ths transfer and as an element of the very transaction *all these other creditors are to be provided for to their satisfac-*

tion out of the assets so transferred, and as a matter of fact all these other creditors are at once provided for to their entire satisfaction according to the terms and conditions of the transfer, in such a case this creditor is not within the penal provisions of § § 35, 39, even though it should turn out that the information was erroneous and there were in fact other creditors not provided for.

This rule results as a necessary corrolary from the two propositions before stated. If all the creditors which the insolvent actually has consent to a compromise, the statute is not violated. If all the creditors whom the one taking the transfer knows of and has reasonable cause for believing to exist, consent to the transaction and are satisfied, then also the statute is not violated. The penal provisions and forfeitures of the sections *do not depend upon the actual state of facts as they finally turn out to exist, but upon what the creditor dealing with his insolvent debtor had fair and reasonable grounds as a prudent business man acting in the usual manner to suppose existed at the time of the transaction.* It is undoutedly difficult sometimes to act upon this rule, but it is none the less the true one. The court is bound to shut its eyes to the actual facts as they have been ascertained by subsequent investigation, *and to put itself back in the creditor's place at the time of the transaction and contemplate the facts as they appeared to him there.*

There are undoubtedly dicta to be found in some of the cases, which intimate that any settlement among creditors or any agreement to effect a settlement and distribution except through the process of the Bankruptcy Court, is a violation of the act, and that a creditor who takes a transfer of the insolvent's property agreeing to share it among all the other creditors, does so at his peril, and is within the penal provisions of § § 35, 39, if it turns out that there are any other creditors whom he did not discover and for whom he does not provide. This connot be a correct construction of the act; it utterly disregards the conditional language which rests the transferee's liability upon the absence of reasonable grounds of belief, and makes him a *guarantor of the correctness of his belief.*

It may be conceded that a general assignment by an insolvent to a trustee for the benefit of all his creditors, is an act of bankruptcy, because this is an attempt to make a forced distribution of the property without the consent of all. But this doctrine has no application whatever to the liability of a creditor to whom a transfer has been made. A transfer may be an act of bankruptcy under § 39, and at the same time no liability on the part of the transferee may arise therefrom under § 35.

If an insolvent debtor should transfer all of his property to one creditor upon the express condition that the claims of *all* the creditors should be satisfied out of it, and as a matter of fact all were satisfied with their shares and consented to the arrangement, it could not be pretended that the one to whom the transfer was made fell within the penal clauses of sections 35 and 39.

If this be conceded—and its correctness cannot be questioned—it follows as a necessary consequence, that if the creditor to whom the transfer is made, is informed, in such a way that he has a right to believe his information, of all the other creditors besides himself, and as a condition of the transfer to him, undertakes to satisfy all these other persons obtaining their consent to the transaction, and subsequently does carry out his undertaking and does share the property with all the others to their entire satisfaction, he is innocent of any violation of sections 35 and 39. It cannot be said of him that he knew or had any reasonable cause to believe that a fraud upon the statute was contemplated, because instead of being an actor in a fraud by which he obtained a preference over others, he supposed that all others were being provided for as well as himself, and that all the others were consenting to the transaction. Such a creditor would hold the property as against the assignee even though it should turn out that his information was incorrect, and that there were a hundred other creditors who had got nothing.

The Supreme Court has interpreted the penal clauses of these sections in conformity with the foregoing views,

and has sustained the conclusion at which I arrive in a very clear and decisive manner. In construing §§ 35 and 39, and determining the conditions under which a creditor becomes liable by reason of a preference, this court has in two leading cases announced the rule in the following language: "The transfer by a debtor who is "insolvent of his property or a considerable portion of "it to one creditor *without making any provision for* "*an equal distribution of its proceeds to all his credi-* "*tors*, operates as a preference to such transferee, and "must be taken as *prima facie* evidence that a preference "was intended" etc.

Wager v. Hall, 16 Wall, 584, 602, per Clifford, J.
Toof v. Martin, 13 Wall, 40, 48, per Field, J.

This language twice used in stating the construction adopted by the court, plainly means something; and, I submit, it declares the very doctrine which I am maintaining. While defining the conditions under which the transferee is liable, it also says that if, *at the time of or connected with the transfer made to him, provision was made for an equal distribution to all the creditors, he is not liable.* As I have already shown, the statute is fully satisfied if the distribution is to be made *to all the creditors whom the transferee knew and had any reasonable grounds of knowing.*

It remains to apply these legal principles to the facts of the present case.

Third.—Application to the facts of this case. The credible evidence shows that the defendants did not have any reasonable cause to believe that a fraud upon the act was intended by the transfer and payment, or that such transfer and payment were a fraud on the act, or that any preference was intended to be given to them or was given to them.

They knew of no creditor in addition to themselves other than A. T. Macary, the father, who released and discharged his claim as an inducement to the transaction and in consideration thereof, and certain firms in Ro-

chester for whom they were acting, and whom they undertook to satisfy out of the assets which they received, and whom they did satisfy according to this undertaking. They had no reasonable ground for supposing that there were other firm creditors besides those above enumerated; *and in fact there was no other firm indebtedness to an amount exceeding about* $250. These defendants, therefore, had every reason to believe, as ordinary prudent business men, *that they were effecting a compromise in which all the creditors partook, or were to partake, to their common satisfaction;* and they were justified as good business men in acting upon this belief.

The correctness of the foregoing depends, of course, upon the evidence. I have already given the two versions in outline. I beg the attention of the court to some points of comparison between the two, and to some observations upon the complainant's story, before commenting upon the important facts proved.

A. The complainant's version is utterly unreliable, and should be rejected by the court except where it agrees with that given by the defendants, for the following general reasons.

(1). *The interest of his witness.* The Macarys are all interested as much as though they were the parties to the record—they are the real parties in interest. If the action succeeds A. T. Macary will be paid in full. The sons will have all their debts paid off, will be entitled to a discharge, and will have a handsome balance to put in their own pockets. The defendants cannot prove their claim; the other Rochester firms have been satisfied and have not proved; Mowry & Co. have been paid by Sloman. After paying off the father and all other *firm* debts, these debtors would have about $1,800 for themselves. I might stop to ask if the Legislature ever contemplated such a result as possible; but I refer to it now to show how deeply interested all these witnesses are in the event of the suit.

(2). *The manifest falsehoods and wilful prevarications to be found in the testimony itself.*

It should be remembered that Henry S. and Harlow E. on the one side, and Michaels on the other, describe the events at Hudson, prior to the transaction at Coldwater on the 25th of October; of that transaction, Henry S. and the father, on the one side, and Michaels, Sloman and Shipman on the other, give different versions. If Henry S. is shown to have sworn falsely in reference to events at Coldwater, his testimony in reference to events at Hudson is worthless, and the entire account of the latter given by the Macarys is rendered untrustworthy.

It is a familiar rule that if a witness is detected in a falsehood, in some *one material* point, *his* entire credit is gone. I can only take the time to show an instance or two of these evident falsehoods and prevarications.

(*a.*) A. T. Macary is guilty of a plain falsehood in his testimony as to the paper writing which he executed. He says, "In preparing this paper four or five lines were written, then a space of two or three lines left blank, and then about a half dozen lines were written. This was its condition when I signed it and I regarded it with suspicion at the time.

Deposition of A. T. Macary, p. 10, fol. 37.

The witness could not have been *mistaken* in this statement; it is too circumstantial and extraordinary. Laying aside Shipman's, and Sloman's and Michael's testimony which directly contradicts the witness, the paper itself shows that the whole statement is a wilful falsehood. We introduced this paper in evidence, and neither of the Macarys pretend that it is not the very paper which A. T. Macary signed. An inspection shows that the statement quoted is impossible, for the instrument is only one continuous sentence from the beginning to the end, appearing exactly in the original as it is printed in the record. Any such omission and subsequent filling up is simply a matter of impossibility. I submit that this single *lie*—I must use a plain but appropriate word—stamps all of A. T. Macary's testimony as worthless.

(*b.*) Again, Henry S. Macary is guilty of a palpable prevarication in a most material matter. In relation to the paper signed by his father on the 25th October, he testifies: "I think father did not sign any paper assenting to the sale of our stock to any body. I don't remember that Mr. Sloman's name was mentioned in the paper that father signed. It is my best recollection that Sloman's name is not mentioned in the paper father signed. The substance of the paper that father signed was that he would not make us any trouble till such time as Mr. Michaels should get his pay. I think that was all of it."

Deposition of H. S. Macary, p. 33, fols. 102½, 103.

All this might be forgetfulness under some circumstances, although it would be a most remarkable failure of memory. But immediately after, on the same day, Sloman was examined, and produced the paper executed by A. T. Macary, and it was put in evidence—(Deft's Ex. B., p. 69, fol. 199.) As soon as Sloman's evidence was finished, Henry S. was re-called, and testified that he had heard the entire testimony of Sloman as it was given.

"Ques. State whether such testimony has changed your recollection of the transactions as you have already testified to them, or in respect to any or either of them, or any part thereof? Ans. It has not." It should be carefully noted that after this paper was introduced in evidence, neither the father nor either of the sons made any pretence that it was not the very instrument which A. T. Macary had signed, and that it was not perfectly genuine. I submit that the testimony of a witness, who, with the very paper writing before him, will give such an answer as the one last quoted, should be disregarded. He either wilfully swears falsely, or else swears so carelessly and even recklessly that no reliance is to be placed in him.

These are only specimens of the pervarications to be found through the Macarys' entire testimony. They are so important, however, that they cannot be explained away or their effect avoided.

(3.) *The plain contradictions.* A. T. Macary's and Henry S. Macary's account of what took place at the office of Shipman, is directly contradicted in general and in particular by the testimony of Shipman, who is certainly a witness without a suggestion of interest. This contradiction extends to the following particulars, viz: when the interview took place, who was there, the adjournment to tea, when Sloman came in, the conversation between the parties, and what was done. If Mr. Shipman is to be believed, the evidence of A. T. and Henry S. on this subject must be wholly rejected as simply false. It is fair to urge that if Henry S. is false here the story he tells of what took place at Hudson is also false. Mr. Shipman corroborates Mr. Michaels and Mr. Sloman, and this corroborating effect should fairly be extended to the rest of the same person's testimony.

Again, the account given by A. T. and Henry S. of the transaction at Coldwater on the 25th is completely contradicted by the papers which were executed and which are not now denied. It is simply absurd to suppose that any sane men would talk as the Macarys represent, and agree as they also represent, and immediately turn around and execute such written instruments.

Again, the Macarys' account is contradicted by many circumstances and acts of their own which they admit. One instance must suffice. The young Macarys both swear over and over again, that Michaels was informed of the chattel mortgage to Mowrey & Co., while he was at Hudson, and said he did not care, and that Sloman was also informed of it before the transfer to him. According to them, therefore, Sloman and Michaels took with full knowledge of this lien. Yet they state that when Sloman came to Hudson on the 27th and demanded some security for the chattel mortgage they at once and without any objection assigned to him all their dues and demands and accounts to help pay it off. The assignment in evidence of that sale tells its own story, and the Macarys admit it all. Now I say that this act of theirs in transfering all

their remaining firm property to Sloman for that express purpose, shows conclusively that they had not told Sloman before of the mortgage. This act of theirs which they admit, is a plain contradiction of their whole story on this subject. Their act is fully consistent with our whole version, and is utterly at variance with their pretended disclosure and with their entire story. One of the Macarys says this assignment was to Sloman for Michaels' benefit; but this don't help the matter any, and at best this statement was utterly without any foundation in fact. I should gladly dwell upon this subject, because it is exceedingly important, and affects the whole case. It is one of the ear marks—one of the circumstances which the witnesses have carelessly suffered to come to the light, and which indicate the position of the parties unmistakably.

4—*The utter absuadity of the story.* Michaels, a creditor to over $4,500 of utterly insolvent debtors, knowing of all the other creditors for whom he makes no provision and knowing even of a chattel mortgage on the goods which he does not attempt to provide for or pay off, proposes that there should be a secret sale to himself or to Sloman, but that the debtors should remain in full possession and carry on the business as before. He moreover promises to keep on furnishing more goods as long as wanted, and all this without any security or present payment; nay, he is so anxious for the insolvents that he insists upon the fathers surrendering *his* claim for no other reason than that he should not be able to trouble his own sons, and he makes a journey and visits the father in order to procure this to be done. When a fraudulent scheme is proposed we naturally expect that the party proposing will try to secure some benefit to himself, but according to the story told us, Michaels proposed all this arrangement without making any provisions whatever for his own benefit; he demanded no present payment, nor any security, he was not to have possession nor was any agent of his to have possession—and all of the witnesses but one agree that no provision was to be made for future payments. The only witness, Henry S., who gives a different version, says

merely that Michaels and Levi were to have the balance of the profits after all the wants of the insolvents were satisfied and the other creditors were paid.

This is an accurate outline of the proposal made by Michaels and of all his conversation up to the moment when the papers were signed.

We have then this picture: A creditor to a large amount proposes a scheme grossly, absurdly fraudulent on its face; he does not get any pay or security for his demands; he promises to furnish more goods to an unlimited amount; all this for the benefit of his insolvent debtors and other creditors.

I submit that the Court will not believe any such story. There must be motives for men's acts. Michaels must be presumed to have known the law and to have been aware that such a transaction would lead to a sure forfeiture of all his demand. The Court will assume that Mr. Michaels has ordinary common sense and business knowledge, and that he is neither crazy nor an idiot. For him to have proposed such an arrangement he must have been one or the other.

(5)—*Finally, what all the parties, the Macarys, Michaels and Slomon actually did, was entirely different from what the Macarys testify Michaels proposed to do.* This is perhaps the most important feature of all, and the complainant makes no attempt to account for the change in the programme. The Macarys fail to show when and how Sloman became a consenting party, when and how they agreed upon the price he paid. Pretending that Michaels proposed a simulated sale to Sloman, they make no mention of any payment to be made by Sloman, nor of turning over the proceeds to Michaels, nor even of Michaels giving a discharge of the demand of his firm. They would have us believe that this pretended arrangement was stated over again in Mr. Shipman's office. And yet, as soon as they all begin to *act*, Henry S. gives a bill of sale to Sloman and without a word of dissent or sur-

prise, receives the price mentioned therein; this price he at once hands to Michaels and receives an acquittance from the latter, while the father executes the release on his part. How the parties came to do these things, and why they all did them so naturally and as though the whole was fully understood and agreed upon, the testimony of the Macarys completely fails to explain.

For these reasons, among others, I submit that the whole version given by the Macarys is unreliable and should be rejected.

B.—The defendant's version is the reliable one; it is natural, is supported by the probabilities of the case, and by the strong preponderance of credible evidence.

If the story told by the Macarys is rejected, that of the defendants must of course be adopted. But there are affirmative reasons in its favor.

(1)—*The interest of the witnesses.* Michaels is of course interested. Mr. Sloman has no pecuniary interest in the event of this suit. Mr. Shipman is without interest or bias. Unless all of the rules which govern the weight and credibility of evidence are to be abandoned, Mr. Shipman should be implicitly believed.

(2)—*Its consistency.* The defendant's witnesses confirm and corroborate each other. There are no contradictions; and their story is consistent with what was actually done.

(3)—*What all the parties actually did, was exactly what Michaels and Sloman say was proposed to be done.* Our case in this respect stands in marked contrast with that of the complainant. The final acts of sale, payment, execution of releases and all others, were just what we say was agreed upon, and these acts are only explainable by our version of all the preliminary negotiation.

(4)—*Corroborated by the writings.* The defendant's account is exactly confirmed by all the written documents. The writings tell what the parties then thought, and in-

tended and did. It would violate all the rules of evidence to reject these written testimonies and the oral evidence which agrees with them.

(5)—*Its inherent probabilities.* Mr. Michaels is represented as acting like a prudent business man. He knew the bankrupt act and the danger of accepting a payment in preference. At the same time he endeavored to obtain for his house all that he could out of the insolvent debtors. He knew that to do this there must be a settlement with *all* the creditors. The proposition that the father should give up his demand, in order that Michaels and the other business creditors might receive more, was natural and legal, and it was natural that the father should accept it, since by doing so all the other firm debts of his sons were extinguished.

(6)—*Mr. Sloman's testimony.* The complainant made a fierce onslaught upon Sloman in his cross examination, and a few words are due to him.

In the first place, the only vitally material testimony given in the case by Sloman was that which described the transaction at Mr. Shipman's office, and in this he is fully corroborated by Shipman as well as Michaels, and no attempt was made to shake him in his account. What he did *after* the 25th October could not affect the rights of the parties which were fixed on that day, and what he did at his own store on the afternoon of the 25th Oct. is really immaterial, because, *there is no pretence that he did not pay over the money as he testifies and in the form which he testifies.*

In the second place, the cross-examination was mostly upon utterly immaterial matters, and absolutely failed to produce any contradiction or doubt upon a single point of any importance.

I must refer to an example or two. Sloman said that the bill of sale was handed to him with the inventory attached, and his recollection was that it was attached by a pin, etc., etc. The counsel dwells upon this at great length, and even required Mr. Sloman to point out the pin

holes in the bill of sale. How the inventory was attached was of course utterly immaterial; whether it was present at all was also immaterial. But that it was present is beyond all question, and Mr. Sloman's statement is fully corroborated. Mr. Shipman recollects that the inventory was there (p. 57, fol. 169). But what settles the matter is the bill of sale executed by the Macary Bros. to Sloman. It conveys goods "as per inventory delivered with this." (Deft's Ex. A., p. 68, fol. 199.)

Another attack upon Mr. Sloman related to what took place during the week commencing Oct. 25, and was an endeavor to confuse him in respect to the days on which he went to Hudson, and the day on which he learned that there was a chattel mortgage on the goods. *Failure to distinguish between the days of the week on which* any thing was done at the distance of a year, is certainly not remarkable, and throws no doubt upon the credibility of the evidence as to *what was done*.

In the third place, the principal attack is upon Mr. Sloman's statement of the source from which he obtained his money on the 25th of October, and especially the $500 draft. It is claimed that the evidence of the account books given by the bankers contradicts Mr. Sloman, and renders it impossible that he could have procured and used a draft as he testifies he did.

This testimony of the account books is deprived of all such force and effect, by the single fact admitted by the witnesses, *that the books of account did not show all the transactions in drafts which might have been carried on*. If a person brought cash and purchased a draft, this would not go on the books. This is really the most common mode of doing business of the kind. As the witness says, the books only show the transaction when a customer of the bank deposited his money, and paid for a draft by his check against his own deposit. Circumstantial evidence, as this is, has no force and effect unless it leaves no other way of explanation than the fact desired to be proved; if there are other modes of explanation, such evidence does not in the least tend to prove the desired

fact. This principle is well illustrated in the case at bar. Sloman testified that he had purchased a draft between certain days; the complainant brings the banker's books, and shows on them either no entry of a draft bought, or entries of two drafts bought and made payable to the order of Michaels & Levi; and it is claimed that Sloman is effectively contradicted, because the drafts of which there is record do not agree with the one he testifies to.

Now if the banker had told us that *all* drafts bought of them were entered in their books and a record of them made, the above described evidence would have been inconsistent with Sloman's narration. But the bankers tell us the very opposite, and thus deprive the entries in the books of all such force and effect. In short, Mr. Sloman might have bought dozens of drafts per day and the books make no record. Whatever transactions were made with actual cash would not be entered in the books either in Sloman's own account, or in the account of drafts. The effect of this evidence, upon which so much reliance is placed, is thus absolutely destroyed.

One other remark is necessary. Assuming that the books effectually contradict Mr. Sloman, the complainant urges that the $500 draft paid over by Sloman on the 25th October was really a draft that he had given to Mr. Michaels on account a few days before; that on the 25th Michaels had handed back the draft to Sloman, and perhaps some money also, so that Sloman might go through the form of paying cash; that as Michaels thus furnished the price, the sale of the goods was in truth to the defendants. Besides the banker's books, the two Macarys, when it was found to be necessary, very conveniently remembered something that Michaels had told them. After all his evidence was ended, in which he had narrated again and again the conversations with Michaels at Hudson, and after Sloman had testified, Henry S. Michaels was recalled and declared that on the morning of October 25th at Hudson, Mr. Michaels took out his pocket-book and showed him a draft which he said Sloman had paid him a few days before,—he thinks for $500. This was sworn to in Decem-

ber, 1870. A year after, Harlow E., who had been examined at length, was recalled and testified that on the forenoon of Oct. 25, at Hudson, "Mr. Michaels told witness that before he (M.) left Coldwater, Sloman paid him all the money he had on hand, and that he had overdrawn his bank account. (p. 59, fol. 174). Such opportune recollections are always and justly suspicious. The pretence that Mr. Michaels made these statements is under the circumstances too absurd and ridiculous to call for grave refutation.

The whole theory of the complainant falls where the foundation of proof is taken away, as we have done by showing that the Cooks do not impeach Mr. Sloman's testimony.

But I meet the theory squarely. Granting that Mr. Michaels furnished *all* the money which Sloman used on that day, and granting that as between Sloman and the defendants, the latter were to be interested in the purchase as part owners (of which there is not the slightest *proof*, the evidence being uncontradicted, that Sloman put the goods with his own and sold them, paid up his notes, etc., etc.) —granting all this, it does not in the least affect the nature of the transaction and the liability of the defendants. If the defendants acted in such a manner—as I claim they did—that they had no reasonable grounds to believe a fraud on the act was intended, it makes no difference whether the goods were transferred at once to them, or were transferred to another person, and the price paid to them.

Finally, Mr. Sloman's testimony is fully corroborated by Mr. Shipman's evidence and by the writtem documents, and, I submit, is entitled to full credit as against the falsehoods and prevarications of the three Macarys.

I. The credible evidence in the case shows that Mr. Michaels in his investigation at Hudson and at Coldwater, had reasonable grounds for supposing that he knew of all the creditors who had any claims against the Macary brothers, and who could be affected by a transfer of their property either to himself and his partner, or to Mr. Sloman.

1. The reasons already given show that Mr. Michael's version of the testimony should be accepted, and I adopt it in my further argument, not discussing over again the comparative credibility of the two accounts. If Michaels is shown to be correct in his story of the events at Mr. Shipman's office when the affair was concluded, we have a right to assume that he is right in his account of the prior negociation.

2. Mr. Michaels testifies directly that he enquired, and was informed by the Macarys of all their creditors; that his own firm and the other Rochester firms, and their father A. T. Macary, were *all* of their creditors. This should be believed, if as I have shown, he is corroborated, and the Macarys are impeached by other credible evidence in the case.

3. He testifies that he did not take their books to examine them privately. Their statement that he did is subject to the same doubts which affect all their other testimony. It would not be natural that they should give up possession of their books to a creditor who had come to procure if possible the payment of a very large demand. But one fact is decisive. *The Macarys have not produced their boeks in this case so as to show that they did contain any information which, it is said, Michaels obtained or could have obtained from them. If these books contained evidence of other creditors we may be sure that they would have been produced.*

4. Mr. Michaels had a right, from his knowledge of the firm of the Macary Bros. and of their business, to suppose that he had discovered all of their creditors, and he acted as a prudent and fair business man in proceeding upon that supposition.

The firm had been in existence since August 1868, and had traded with his own house from the first; he knew it had traded with the other Rochester houses; he thus knew what and how much goods it had bought; from his examination of their stock at Hudson, he was enabled to judge that they had not traded with other

dealers,—at least he had reasonable grounds for believing that they had not done so.

5. He did not know—and had no reasonable grounds for knowing or even suspecting of any dealings by the Macary Bros. as a firm, or by Henry S. as an individual, in tobacco, cigars or other commodities outside of their regular business,—and therefore had no grounds for supposing or suspecting that there were any creditors growing out of such dealings.

He knew their business was clothing and mens' furnishing goods; this was their ostensible public business; *there is no evidence that any tobacco and cigar business had been carried on in public at the store, and no evidence that Michaels knew of it.*

6. The schedules of creditors filed in the bankrupt court, and the list of debts proved, *show that Mr. Michaels had in fact substantially discovered all the firm creditors of the Macary Brothers.*

It should be remembered that we had no opportunity to contest the correctness of any of these demands; the father and his sons had full opportunity to make up what lists they pleased. The schedules give clear proof of gross mistakes and errors, if not of falsifications,—I reserve the case of Mowry & Co. and their chattel mortgage for a separate consideration.

The debts against the firm proved, besides that of the father A. T. Macary, are three different parties for furnishing goods, $84.50, $36, and $31.35, one for printing, $93.48, and one Miller & Co., for cigars, $53.75. Against H. S. Macary, three different parties—one being Miller & Co.) each for cigars, $37.50, $42.50, $49.50, (p. 72, fol. 207). *In the schedule of debts as filed, the whole of Miller & Co.'s demand is against H. S. Macary, and of course the claim of $53.75 for cigars was not a legitimate firm debt*

It is fair to assume that *these debts thus proved embraced all of the firm liabilities which by possibility existed,* and how much of them was valid, we have no means

of even guessing. The result is that Mr. Michaels *failed to discover and to provide for just* $245.33 *of firm liabilities.*

Turning to the schedules, they tell a plain story. They contain, of claims against the firm, the demand of Mowry & Co., secured by chattel mortgage, $355. The unsecured debts include that due to the father, those due to the Rochester firms already mentioned and the four items mentioned above as proved. The remaining items,—none of which have been proved—are instructive and amusing. Three principal ones are physician's bills, one is a grocer's bill, another for a pair of boots, another still for livery hire. It is the first instance in which physicians attended a partnership I think (pp. 74, 75, 76).

These acts of the Macarys themselves show that Mr. Michaels actually discovered all the firm creditors substantially. He cannot be charged with knowledge, nor with grounds for suspecting any tobacco debts of H. S. which had been assumed by the firm in violation of the equitable rights of their legitimate creditors. Much less can he be charged with knowledge of the partners private debts for doctors, grocers, shoemakers, and livery stable bills. The slight amount of indebtedness ($245) which he failed to discover, cannot weigh against all these other facts and create a liability against him.

7. The debt and chattel mortgage to Mowrey & Co. It is utterly impossible to believe that Mr. Michaels was informed of this fact. The debt was not a legitimate firm liability. Michaels' conduct shows that he was ignorant of it. The testimony of the Macarys that he was told of it, and said he did not care, is absurd on the face. There is no mention made of it in the negotiations, no provision for taking care of it. Sloman's conduct shows that he did not know of it. He goes to Hudson on Tuesday and makes arrangement with the Macarys, but not a word is said about this mortgage. He returns again on Wednesday, demands security, and the Macarys without opposi-

tion transfer to him all their book accounts. These acts are admitted by the Macarys. Would they have done so if, according to their story, the existence of the mortgage had been disclosed and it had been treated by Michaels and Sloman as a matter of no consequence? That Sloman *did* regard it of consequence, is shown by the fact that he immediately opens a negotiation with Mowrey & Co., and pays it off.

8. In determining the truth of conflicting narrations we have a right to appeal to the ordinary motives of men and their ordinary mode of action. We have a right to start with the presumption that Mr. Michaels knew the law, and knew the effect of its violation, and the severe penalties resulting from a preference to his house. We must assume that he would try to avoid those risks. Even in the absence of all evidence we ought to presume this; and certainly evidence which agrees with the presumption is entitled to be believed. This consideration applies to each of the foregoing seven heads and adds an emphasis and peculiar force to them.

The conclusion is that Mr. Michaels had reasonable grounds for believing that he had discovered all the creditors. He used the ordinary and natural means; he applied to the proper persons. If he acted as an *ordinarily* prudent business man would do under like circumstances, this was enough. A fair construction of the statute does not demand extraordinary efforts; he was not obliged to consult the records of clerks' offices, and the like.

II. Having obtained the information upon which he could reasonably rely, Mr. Michaels, in the plan of settlement which he proposed and effected, sufficiently provided for all the creditors, and clearly avoided any preference to his own firm and any fraud upon the bankrupt act. No intent, and no reasonable grounds to believe there was an intent, to obtain a preference or to commit a fraud on the act can be charged to him.

1. If there was no such intent, it makes no differ-

ence what disposition was actually made of the debtors goods, whether they were converted into cash and the proceeds distributed, or whether the goods themselves were distributed.

2. The preference of creditors, and the fraud upon the act consist solely in an unequal application of the debtors' assets against the consent of all the creditors. If there is an unequal distribution voluntarily consented to by all, and even if some creditor voluntarily consents to discharge his demand without receiving anything, the statute is not violated.

3. As a matter of fact all the creditors whom Michaels discovered, except A. T. Macary, were paid their *pro rata* shares equally with the defendants themselves.

Deposition of Michaels, p. 80, fol. 224; p. 84, fol. 233; p. 85, fol. 235¼; p. 86, fols. 238, 239; p 87, fol. 240¼.

This testimony of Mr. Michaels was taken in Detroit in June 1870. In December 1870, the complainant and Henry S. Macary were in Rochester and examined witness. Of course they could have brought up the other Rochester creditors and contradicted Mr. Michaels' statement if possible. No attempt was made to do so, and the evidence of Mr. Michaels on this point is uncontradicted. Again, none of these other Rochester creditors have proved any claims, and that fact corroborates Mr. Michaels. When Michaels had testified to the fact, and the complainant having afterwards full power and opportunity to contradict if possible by the very persons themselves, made no attempt to do so, it was certainly unnecessary for us to bring forward further proof which would be merely cumulative. It stands then a conceded fact in the case that Mr. Michaels was in all the transaction acting on behalf of these other firms as well as his own, and shared the proceeds with these firms according to their several proportions.

4—The settlement with A. T. Macary was legal and did not violate any provisions of the statute. There is nothing in the act which *compels* a creditor to accept his share if he is willing to release the debtor without any payment.

5—The result is that all the creditors known to Mr. Michaels were settled with, *to their own satisfaction*, and they voluntarily gave discharges. This proceeding clearly satisfies the demands of the statute; provided, it was based upon a sufficient information and knowledge as to the existing creditors.

III.—If any *prima facie* presumption hostile to the defendants arose from the circumstances of the transfer, it has been fully met and removed by the foregoing facts affirmatively established.

1—I submit that the transfer by a trader of his entire stock in trade for a fair price, is not *of itself* so out of the usual course of business, that the statutory presumption arises. It should be noticed,—what some judges have failed to observe,—that the language is not "out of the usual course of his business." It does not therefore imply that the sale shall be out of the usual mode of carrying on the business by the seller himself, but implies that the transfer must be out of the usual course of the business itself, that is, out of, or not according to the modes in which persons engaged in that business are accustomed to act. A sale by a trader of his entire stock for a fair price and upon fair terms is certainly not an unusual transaction and such a sale is certainly the usual mode of carrying on the retail trading business.

The phrase "the business of the debtor" used in the statute, means the *species* or *kind* of business he transacted —as, e. g. the retail grocers' business, etc.

I concede that some of the District Judges have held directly in opposition to these views; but I submit that they are supported by the decision of this Court in

Walbrun v. Babbit, 16 Wall, 577.

The transfer in this case was held to be out of the usual course of business, not because the trader sold all his stock, but on account of various circumstances accompanying the sale,—the inadequate price,—the concealment and the like.

2—The transfer in this case lacks all the features upon which the Supreme Court relied in *Walbrun v. Babbit.* The price was adequate. Seventy-five per cent. on cost is an ample price to pay for such a stock. Michaels and Sloman, both experts, say the price was high, and no attempt is made to show the contrary. The complainant is silent on this subject. The terms were certainly very advantageous.

3—But if I am wrong in this position, the defendants have overcome any hostile presumption which the statute arbitrarily raises. The provision merely changes the burden of proof; *it does not affect the kind of proof, nor the weight of the evidence.* Its only legal significance is, that in the absence of any explanatory evidence the transfer must be held a fraud on the statute.

The whole argument under this Second Point shows that the presumption has been overcome.

I submit that as the result of either branch of my argument the decree should be reversed and the bill dismissed with costs.

This case discloses no fraud committed—no preference intended or obtained by the defendants. On the contrary, it shows that the Macarys, father and sons, have been guilty of a gross imposition upon the bankruptcy court, and have attempted, by means of its processes to perpetrate an outrageous fraud upon these defendants, who had given them credit. I cannot think that this High Tribunal will enable them to succeed in the attempt.

JOHN NORTON POMEROY,
Of Counsel for the Appellant.